CLERK SUPR

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 348

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY, PETITIONERS,

vs.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

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United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 10,213

IN BANKRUPTCY.

CITY OF LINCOLN, NEBRASKA, ET AL., APPELLANTS,

vs.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY, ETC., APPELLEE.

No. 10,218

IN BANKRUPTCY.

L. A. RICKETTS, TRUSTEE IN BANKRUPTCY, ETC., APPELLANT,

vs.

CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES.

No. 10,219

IN BANKRUPTCY.

CITY OF LINCOLN, NEBRASKA, ET AL., APPELLANTS,

vs.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY, ETC., APPELLEE.

No. 10,220

IN BANKRUPTCY.

L. A. RICKETTS, TRUSTEE IN BANKRUPTCY, ETC., APPELLANT,

vs.

CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JANUARY 10, 1935.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the March Term, 1935, of said Court, before the Honorable Archibald K. Gardner, the Honorable Joseph W. Woodrough and the Honorable Arba S. Van Valkenburgh, Circuit Judges.

Attest: E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the tenth day of January, A. D. 1935, a transcript of record pursuant to an appeal from the District Court of the United States for the District of Nebraska allowed by the United States Circuit Court of Appeals for the Eighth Circuit, and an appeal allowed by the District Court of the United States for the District of Nebraska, in certain causes wherein the City of Lincoln, Nebraska, et al., were Appellants and L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, was Appellee, and pursuant to an appeal from the District Court of the United States for the District of Nebraska, allowed by the United States Circuit Court of Appeals for the Eighth Circuit, and an appeal allowed by the District Court of the United States for the District of Nebraska, in certain causes wherein L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company Bankrupt, was Appellant, and the City of Lincoln, Nebraska, et al., were Appellees, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 United States District Court for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

No. 2314. In Bankruptcy.

Re: Claim of City of Lincoln and Standard Accident Insurance Company.

Transcripts of Record on Appeal and Cross Appeal.

2 In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

No. 2314. In Bankruptcy.

In Re: Claim of City of Lincoln and Standard Accident Insurance Company.

Pleas before Honorable J. A. Donohoe, Judge of the District Court of the United States, in and for the District of Nebraska, within the Eighth Judicial Circuit, at the October 1934 Term of said Lincoln Division, begun on the 4th day of October, 1934, and held, for the Court's convenience, at the United States Court House in the City of Omaha within the Omaha Division of the District of Nebraska.

Appearances.

For Appellant: Stewart, Stewart and Whitworth, 1412 Sharp Building, Lincoln, Nebraska.

For Appellee: R. A. Boehmer, 126 South 11th Street, Lincoln Nebraska.

Be It Remembered, That at a District Court of the United States for the District of Nebraska, Lincoln Division, held

at the United States Court House in the City of Omaha, in the Omaha Division, for the convenience of the Court, at the October 1934 Term, there being present and presiding Honorable J. A. Donohoe, United States District Judge in and for the District of Nebraska, proceedings were had and done in the respective days hereinafter mentioned in the matter of Claim of the City of Lincoln against L. A. Ricketts as Trustee of the Lincoln Trust Company, Bankrupt, that is to say:

3 Praecipe for Transcript.

Filed at 3:—P. M. Dec. 31, 1934.

To R. C. Hoyt, Clerk of Said Court:

Waiving the printing of the record under the provisions of an act of Congress entitled "An Act to Diminish the Expense of Proceedings on Appeal and Writ of Error or Certiorari" approved February 13, 1911, electing to take and file transcript of the record in the United States Circuit Court of Appeals, 8th Circuit, and to be printed under the supervision of the clerk in accordance with the rules of said court of appeals, you are hereby directed to prepare a transcript on appeal of City of Lincoln, Nebraska and Standard Accident Insurance Company, as appellants, for entry in the Circuit Court of Appeals, 8th Circuit, and to incorporate therein the portions of the record herein designated.

Claim of the City of Lincoln, Nebraska filed as a general claim. (Omit all exhibits attached to claim.)

Order allowing claim as that of a general creditor. (Show only allowance of City of Lincoln's claim and total amount of other claims allowed without listing other claims separately.)

Application of the City of Lincoln to amend claim to claim priority and to set aside allowance.

Objection of Trustee.

Order allowing City of Lincoln to file amended proof.

Amended claim of the City of Lincoln.

Objections of trustee to amended claim.

Reply of claimant to objections.

Motion of trustee to withdraw submission of issues and to offer additional evidence.

Objection of City of Lincoln to the application of the trustee to withdraw submission of issues.

4 Order sustaining trustee's motion to offer further evidence.

Stipulation of additional facts and evidence and agreement between the City of Lincoln, Standard Accident Insurance Company, assignee, and trustee on motion to withdraw submission of issues.

Order permitting Standard Accident Insurance Company to be made a party as assignee of the claim of the City of Lincoln.

Order denying claim of the City of Lincoln as a priority claim and directing former order of August 16, 1932 allowing claim as a general claim, allowed to stand.

Petition of City of Lincoln and Standard Accident Insurance Company to review order denying priority and order permitting trustee to offer additional evidence, offered by way of stipulation.

Order denying petition of review as to so much thereof as related to order permitting trustee to offer additional evidence.

Certificate of Referee on petition for review of order denying the claim of the City of Lincoln the right to priority.

Certificate of Referee on petition of City of Lincoln and Standard Accident Insurance Company for review of order denying part of the petition for review.

Request of City of Lincoln and Standard Accident Insurance Company for findings of fact and conclusions of law.

Memorandum of District Judge Donohoe allowing priority in the amount of $12,979.42 of amended claim of City of Lincoln. Filed October 8, 1934.

Order withdrawing memorandum opinion dated October 8, 1934. Filed December 12, 1934.

Memorandum of District Judge Donohoe. Filed December 12, 1934.

Findings of fact and conclusions of law. Filed December 17, 1934.

Judgment and decree. Filed December 17, 1934.

Notice of appeal with admission of service thereon.

Petition for appeal.

Assignment of errors.

Waiver of notice of hearing on petition for appeal.

Order allowing appeal.

Citation on appeal with admission of service thereon.

Bond on appeal.

Petition for appeal to Circuit Court of Appeals, 8th Circuit.

Assignment of errors filed in Circuit Court of Appeals, 8th Circuit.

Waiver of notice of hearing on petition for appeal to Circuit Court of Appeals, 8th Circuit.

5 Order of Circuit Court of Appeals, 8th Circuit, allowing appeal.

Stipulation relating to use of transcript of record for both appeals and cross-appeal.

Statement of evidence with approval thereof.

This praecipe and admission of service thereon.

Signed this 29th day of December, 1934.

DON W. STEWART,
A. A. WHITWORTH,
C. B. PAINE,
Attorneys for Appellants.

I hereby acknowledge receipt of copy of the foregoing praecipe and accept service of the same this 31st day of December, 1934, and propose no additions thereto.

L. A. RICKETTS, as Trustee in Bankruptcy of LINCOLN TRUST COMPANY, Bankrupt,
By R. A. Boehmer, His Attorney of Record.

6 Claim of the City of Lincoln, Nebraska, Filed As A General Claim, Omitting Exhibits Attached Thereto.

555-Proof of Debt Due Corporation.

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, a corporation, Bankrupt.

No. 2314. In Bankruptcy.

At Lincoln, in said district of Nebraska, on the 15th day of August, A. D. 1932, came E. M. Bair of Lincoln, in the County of Lancaster, and State of Nebraska and made oath, and says that he is treasurer of the City of Lincoln, Nebraska, a Municipal Corporation incorporated by and under the laws of the State of Nebraska, and carrying on business at Lincoln, in the County of Lancaster, and State of Nebraska and that he is duly authorized to make this proof, and says that the said Lincoln Trust Company, the person by whom this petition for adjudication of bankruptcy has been filed was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of Forty-Five Thousand Five Hundred Nine and no/100 Dollars; that the consideration of said debt is as follows:

On September 26, 1928, E. M. Bair, as City Treasurer of the City of Lincoln Nebraska, a municipal corporation, placed in the custody of said Lincoln Trust Company, the sum of Forty-five Thousand and no/100 ($45,000.00) Dollars, funds of the City of Lincoln, Nebraska, evidenced by check marked Exhibit "A", attached hereto and made a part of this claim; that said money was to be payable to the said E. M. Bair as City Treasurer on demand, with interest at three per cent per annum, payable quarterly, and said interest was paid thereon to March 26, 1932. To evidence said transaction said Lincoln Trust Company executed and delivered to said City Treasurer nine certificates in the sum of Five Thousand ($5000.00) Dollars each, payable on demand, which certificate marked Exhibits "B" to "J" inclusive, are likewise attached hereto and made a part of this claim; that on the 14th day of June, 1932, said certificates were presented for payment to said Lincoln Trust Company and payment was refused; that on the 15th day of June, 1932, written demand was made on said Lincoln Trust Company for payment of said certificates and payment was again refused. That there is

due and owing from said bankrupt to claimant on account thereof the following sums:

Principal	$45,000.00
Interest thereon at three per cent per annum from March 26, 1932, to June 15, 1932	302.45
Interest thereon at the legal rate of seven per cent from June 15, 1932, to July 9, 1932, the date of filing the petition and of adjudication	206.55

and interest at seven per cent per annum thereon thereafter.

That no part of said debt has been paid (except none); that there are no set-offs or counter claims to the same (except None); and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

E. M. BAIR,
Treasurer of said Municipal Corporation.

7 Subscribed and sworn to before me this 15th day of August, A. D. 1932.

(Notarial Seal)

HELEN M. STEIN,
Notary Public.

My commission expires September 15, 1933.

Letter of Attorney to Max Kier and Lloyd E. Chapman, Attorneys-at-Law. Either of you are hereby authorized by said creditor to appear for and represent said creditor and vote for said creditor in any proceedings, or meetings, which may be had or called in the above entitled proceedings in court, before the referee in bankruptcy or elsewhere and particularly to vote for said creditor in the choice of a trustee of said bankrupt whenever such election is held or in your discretion oppose confirmation of any composition offered by or in behalf of said bankrupt, and to receive [and receive] and receipt for any and all moneys which may be or may become payable to said creditor therein or for or on account of said debt. That said creditor is a corporation, and that the officer executing this power of attorney is duly authorized so to do and to attach the corporate seal on behalf of said creditor.

In witness whereof said creditor has hereunto signed his name and caused his seal to be affixed when signing the deposition proceedings, the 15th day of August, 1932.

CITY OF LINCOLN, NEBRASKA,
a municipal corporation,
By F. C. Zehrung, Mayor, (Seal)
Creditor.

Attest:
Theo H. Berg,
City Clerk.

State of Nebraska,
Lancaster County—ss.

On this 15th day of August, A. D. 1932, before me, the undersigned Helen M. Stein, a Notary Public duly commissioned and qualified for and residing in said county, personally came F. C. Zehrung, who being by me first duly sworn did say that he is Mayor of the municipal corporation above named, and duly authorized to execute the foregoing power of attorney on its behalf, and F. C. Zehrung, to me known to be the identical person whose name is affixed to the foregoing instrument and acknowledged that he executed the said power of attorney for and on behalf of said corporation and that same was his voluntary act and deed, and the voluntary act and deed of said corporation.

Witness my hand and Notarial Seal the day and year last above written.

(Notarial Seal) HELEN M. STEIN,
Notary Public.

My commission expires the 15th day of September, 1933.

Filed at 10:30 A. M. August 16, 1932 in Referee's Office. Filed in Clerk's Office included in Transcript of Pleadings and Proceedings in Petition for Review, June 12, 1934.

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8 Referee's Order Allowing Claims, (Showing Only Allowance of City of Lincoln's Claim and Total Amount of Other Claims Without Listing Separately.)

At Lincoln, in said District this 16th day of August, 1932, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

This being the day set for a first meeting of the Creditors of the above named bankrupt, of which due notice has been

given by mail and by publication, as required by law, and the claims hereinafter set forth having been filed, and it appearing to the Court that the proof thereof is sufficient, and there being no objections thereto,

It Is Ordered, that said claims be allowed in the amounts hereinafter set forth:

Name	Address	Attorney	Amount
* * *	* * * *	* * * *	* * * * *
City of Lincoln by E. M. Bair	City Hall, Lincoln, Nebr.	Max Kier & Lloyd E. Chapman, City Hall, Lincoln, Nebr.	$45,509.00
* * *	* * * *	* * * *	* * * * *
Total amount of other claims listed			$40,506.58

DANIEL H. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office August 16, 1932, Filed in Clerk's Office included in Transcript of Pleadings and Proceedings in Petition for Review, June 12, 1934.

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9 (Application of City of Lincoln to Amend Claim.)

To the Honorable Daniel H. McClenahan, Referee in Bankruptcy:

Comes now City of Lincoln, a municipal corporation, and shows to the court that it filed a claim against the above named bankrupt on August 16, 1932, in the sum of $45,509.00 and that said claim was allowed as a general claim in said amount on August 16, 1932; that through inadvertence said claim did not specifically state that it was entitled to priority and through lack of knowledge claimant did not state fully the facts on which claim to priority was based; that since the filing and allowance of said claim, claimant has discovered additional facts and that in equity and justice it should be permitted to amend its claim by setting forth said facts and specifically claiming its right to priority.

Wherefore claimant moves the court to set aside the allowance heretofore made of its claim as a general claim and to give claimant leave to amend its aforesaid claim by adding thereto just preceding the signature of E. M. Bair the paragraph attached hereto marked Exhibit A and made a part hereof.

CITY OF LINCOLN, a municipal corporation,
By Lloyd E. Chapman,
City Attorney.

10 State of Nebraska,
County of Lancaster—ss.

Lloyd E. Chapman, being first duly sworn, on oath deposes and says that he is the duly qualified and acting City Attorney for the City of Lincoln, Nebraska; that he is acquainted with the matters and facts set forth in the foregoing application and the same are true as he verily believes.

LLOYD E. CHAPMAN.

Subscribed in my presence and sworn to before me this 30th day of August, 1932.

(Notarial Seal) HELEN M. STEIN,
Notary Public.

August 27, 1932.

Received copy of the above application this 27th day of August, 1932, and consent that same may be taken up for hearing on August ..... at ..... o'clock.

L. A. RICKETTS, Trustee,
By R. A. Boehmer,
His Attorney.

Filed in Referee's Office at 11:00 A. M. on August 30, 1932. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings on Petition for Review at 1:50 P. M. June 12, 1934.

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11 (Objection of L. A. Ricketts, Trustee, to Application for Leave to Amend Claim.)

To the Honorable Daniel H. McClenahan, Referee in Bankruptcy:

Comes now L. A. Ricketts, Trustee and objects to the allowance of the application of the City of Lincoln for leave to amend its claim for the reason that said claim was heretofore filed, approved and allowed as a general claim against said estate, and no just cause is shown to set aside the allowance thereof, and to permit an amendment thereof.

Wherefore, your Trustee prays that said application be dismissed and disallowed.

L. A. RICKETTS, Trustee,
By R. A. Boehmer,
His Attorney.

Filed in Referee's Office at 4:30 P. M. on August 31, 1932. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings on Petition for Review at 1:50 P. M. June 12, 1934.

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12 Referee's Order Allowing City of Lincoln to File an Amended Claim.

At Lincoln, in said district, this 28th day of September, 1932, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

The above cause coming on for hearing at a meeting of creditors, of which due notice was given more than ten days prior hereto, upon the application of the City of Lincoln, to file an amended claim, and the answer of the trustee filed thereto, and there appearing on behalf of the City of Lincoln, S. M. Kier and Don W. Stewart, on behalf of the trustee, R. A. Boehmer, attorney and the matter having been heard and submitted for determination, it is,

Ordered, that the City of Lincoln, be, and they hereby are permitted to file an amended proof of claim.

DANIEL H. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 5:00 P. M. September 28, 1932. Filed in Clerk's Office, included in Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M., June 12, 1934.

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13 (Amended Claim of City of Lincoln.)

In the District Court of the United States, District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, a corporation, Bankrupt.

No. 2314. In Bankruptcy.

Proof of Debt Due Corporation.

Amended Claim.

At Lincoln, in said district of Nebraska, on the 18th day of November, A. D., 1932, came E. M. Bair of Lincoln, in the County of Lancaster, and State of Nebraska, and made oath, and says that he is treasurer of the City of Lincoln, Nebraska, a municipal corporation incorporated by and under the laws of the State of Nebraska, and carrying on business at

Lincoln, in the County of Lancaster, and State of Nebraska, and that he is duly authorized to make this proof, and says that the said Lincoln Trust Company, the person by whom this petition for adjudication of bankruptcy has been filed was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of Forty-five Thousand Five Hundred Nine and no/100 Dollars; that the consideration of said debt is as follows:

On September 26, 1928, E. M. Bair as City Treasurer of the City of Lincoln, Nebraska, a municipal corporation, placed in the custody of said Lincoln Trust Company, the sum of Forty-five Thousand and no/100 ($45,000.00) Dollars, funds of the City of Lincoln, Nebraska, evidenced by check marked Exhibit "A", attached hereto and made a part of this claim; that said money was to be payable to the said E. M. Bair as City Treasurer on demand, with interest at three per cent per annum, payable quarterly, and said interest was paid thereon to March 26, 1932. To evidence said transaction said Lincoln Trust Company executed and delivered to said City Treasurer nine certificates in the sum of Five Thousand ($5000.00) Dollars each, payable on demand, which certificates marked Exhibits "B" to "J" inclusive, are likewise attached hereto and made a part of this claim; that on the 14th day of June, 1932, said certificates were presented for payment to said Lincoln Trust Company and payment was refused; that on the 15th day of June, 1932, written demand was made on said Lincoln Trust Company for payment of said certificates and payment was again refused. That there is due and owing from said bankrupt to claimant on account thereof, the following sums:

Principal	$45,000.00
Interest thereon at three per cent per annum from March 26, 1932, to June 15, 1932.....	302.45
Interest thereon at the legal rate of seven per cent from June 15, 1932, to July 9, 1932, the date of filing the petition and of adjudication	206.55

and interest at seven per cent per annum thereon thereafter.

That no part of said debt has been paid; that there are no set-offs or counter claims to the same; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

That said money paid by claimant to the bankrupt as aforesaid constituted a trust fund to be held by the bankrupt for

claimant and should have been segregated and kept separate from all other funds in the bankrupt's possession, but
14 in violation of its duty as trustee the bankrupt wrongfully commingled said money with the bankrupt's own funds and by such commingling the entire money, funds, securities, and assets of the bankrupt were impressed with a trust in favor of claimant in the amount of this claim; that the money, funds, securities and assets of the bankrupt which came into the possession of this court on July 9, 1932, and the possession of the receiver and thereafter the trustee in bankruptcy including the cash on hands and funds on deposit in the name of Lincoln Trust Company and in the name of Lincoln Trust Company Trust Department, both in The First National Bank of Lincoln, Nebraska, together with the securities held in the trust department of the bankrupt known as "segregated assets" included the aforesaid money of claimant or the proceeds thereof and all of such cash, funds, deposits, securities, and assets and specifically those referred to above are impressed with a trust in favor of the claimant and claimant is entitled to payment of the amount due as aforesaid from said cash, funds, deposits, securities and assets and the proceeds thereof before any payments are made therefrom to other persons, corporations, whether as creditors or otherwise, and the trustee should be ordered to immediately pay claimant in full from such cash, deposits, funds which came into the possession of this court as aforesaid and if the amount thereof is insufficient then said securities and assets referred to above should be sold and the proceeds applied in payment thereof and any balance remaining should be paid from the remaining securities or assets of the bankrupt.

E. M. BAIR,
Treasurer of said Municipal Corporation.

Subscribed and sworn to before me this 18 day of November, 1932.

HELEN M. STEIN,
(Seal) Notary Public.

My commission expires September 15, 1933.

Letter Of Attorney to Max Kier and Lloyd E. Chapman, Attorneys-at-Law. Either of you are hereby authorized by said creditor to appear for and represent said creditor and vote for said creditor in any proceedings, or meetings, which may be had or called in the above entitled proceedings, in court, before the referee in bankruptcy or elsewhere and particularly to vote for said creditor in the choice of a trustee of

said bankrupt whenever such election is held, or in your discretion oppose confirmation of any composition offered by or in behalf of said bankrupt, and to receive and receipt for any and all moneys which may be or may become payable to said creditor therein or for or on account of said debt. That said creditor is a corporation, and that the officer executing this power of attorney is duly authorized so to do and to attach the corporate seal on behalf of said creditor.

15 In witness whereof said creditor has hereunto signed his name and caused his seal to be affixed when signing the deposition proceeding, the 18 day of November, 1932.

(Seal) CITY OF LINCOLN, NEBRASKA,
a municipal corporation,
By F. C. Zehrung, (Signed)
Mayor,
Creditor.

Attest:
Theo. H. Berg, (Signed)
City Clerk.

State of Nebraska,
Lancaster County—ss.

On this 18 day of November, A. D., 1932, before me, the undersigned, Helen M. Stein, a Notary Public duly commissioned and qualified for and residing in said county, personally came F. C. Zehrung, who being by me first duly sworn did say that he is Mayor of the municipal corporation above named, and duly authorized to execute the foregoing power of attorney on its behalf, and F. C. Zehrung to me known to be the identical person whose name is affixed to the foregoing instrument and acknowledged that he executed the said power of attorney for and on behalf of said corporation and that same was his voluntary act and deed, and the voluntary act and deed of said corporation.

Witness my hand and Notarial Seal the day and year last above written.

(Seal) HELEN M. STEIN, (Signed)
Notary Public.

My commission expires the 15th day of September, 1933.

Filed in Referee's Office at 4:25 P. M., Nov. 21, 1932. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

16 (Objections and Answer of L. A. Ricketts, Trustee, to Amended Claim of City of Lincoln.)

Comes now L. A. Ricketts, the duly appointed, qualified and acting Trustee in Bankruptcy for Lincoln Trust Company, Bankrupt, and for his objection and answer to the purported claim of E. M. Bair, as City Treasurer of the City of Lincoln, Nebraska, filed herein on or about the 18th day of November, 1932, alleges as follows:

1. He denies each and every allegation contained in said purported claim, and not hereinafter specifically admitted or affirmatively alleged.

2. He further alleges that said E. M. Bair, as City Treasurer of said City of Lincoln, Nebraska, did, on or about the ..... day of ...., 1932, file a general claim in this matter for the same indebtedness, as is set forth in the present purported claim, and that said general claim of said E. M. Bair was heretofore and on or about the 16th day of August, 1932, allowed as a general claim against the estate of said Lincoln Trust Company, and that said allowance is now in full force and effect and constitutes final determination of the rights of said E. M. Bair and said City of Lincoln, Nebraska, against the estate of said Lincoln Trust Company, Bankrupt.

3. That said E. M. Bair, as City Treasurer of the City of Lincoln, Nebraska, did, on or about the 26th day of September, 1928, pay to said Lincoln Trust Company the sum of $45,000.00, being funds of the City of Lincoln, Nebraska, and that said Lincoln Trust Company at said time executed and delivered to the said City Treasurer nine (9) instruments in writing, as are attached to the original claim of said E. M. Bair, and said City of Lincoln.

4. That the principal sum of money so paid to the said Lincoln Trust Company by said city of Lincoln, has not been repaid to said City of Lincoln, but that interest thereon was paid to the claimant at the rate of three (3) per cent per annum up to the 26th day of March, 1932.

17 5. That the money so paid by claimant to said Lincoln Trust Company was deposited in the general bank account of said Lincoln Trust Company, in which account were also deposited monies from a large number of other persons who paid money to said Lincoln Trust Company for the purchase of bonds or other securities, which accounts were entitled "Modern Investments", and that there were a total number of 233 persons depositing money under said Modern

Investments, and in the total amount of $28,133.78, at the date of adjudication in bankruptcy, and that there were also deposited in said general account of said Lincoln Trust Company monies paid in by other persons, under so-called "Eltelic" contracts, wherein said Lincoln Trust Company was to use the money paid in for the payment of insurance premiums as set forth in contracts given to said depositors and that the number of persons having deposited money with said Lincoln Trust Company under so-called Eltelic contracts was 138, and in the total amount of $15,443.67 at the date of adjudication in bankruptcy, and that a large number of other persons also deposited large sums of money with the Lincoln Trust Company for various purposes, that were also placed in the general account of said Lincoln Trust Company, and deposited in its general bank account in which the money of said claimant also was deposited.

6. That the money so paid by claimant to said Lincoln Trust Company was never segregated or kept from other funds in the general account, and general bank deposit of said Lincoln Trust Company.

7. Further answering, said claim, your Trustee alleges that said Lincoln Trust Company, prior to its adjudication, maintained and operated a so-called Trust Department, which department handled and managed estates of deceased and incompetent persons, and in said department had a large number of securities segregated and belonging to said estates and that said department also carried a bank account separate and distinct from the general account of the Lincoln Trust Company, in which account monies received on behalf of said Trust estates were deposited and that the money deposited by the claimant was never in said Trust Department, and was never deposited in the bank account of said Trust Department, and never at any time constituted any of the assets so held by said Trust Department.

18 8. That the monies and securities held in said Trust Department of said Lincoln Trust Company were and are deposited and held for the specific purpose of paying and securing the Trust estates, handled, controlled and managed by said Trust Department and are not subject to a lien or payment of the general claims allowed against the Lincoln Trust Company, Bankrupt.

Wherefore, your Trustee prays that the claim of said E. M. Bair, City Treasurer of the City of Lincoln, and of the said City of Lincoln, be disallowed and dismissed and that the order of the court entered on August 16, 1932, allowing the

original claim of said City of Lincoln be permitted to stand and for such other and further relief as may be just and proper.

R. A. BOEHMER,
Attorney for Trustee.

State of Nebraska,
Lancaster County—ss.

L. A. Ricketts, being first duly sworn on oath deposes and says that he is the above named Trustee in Bankruptcy; that he has read the foregoing objection and answer, knows the contents thereof, and that the facts and matters therein contained are true, as he verily believes.

L. A. RICKETT.

Subscribed in my presence and sworn to before me this 5" day of December, 1932.

(Seal) ELENOR ELDER,
Notary Public.

Filed in Referee's Office at 4:00 P. M. Dec. 5, 1932. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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19 (Reply of City of Lincoln to Objections and Answer of L. A. Ricketts, Trustee.)

Comes now City of Lincoln, Nebraska, and for reply to the objection and answer of the trustee of the bankrupt to its claim, denies specifically each and every allegation therein contained, except such as admit allegations and statements contained in claimant's amended claim and denies that there has been a final determination of claimant's rights against the bankrupt.

CITY OF LINCOLN, NEBRASKA,
By Max Kier, Lloyd E. Chapman,
Its Attorneys.

Filed in Referee's Office at 11:45 A. M. Dec. 7, 1932. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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20 (Motion of L. A. Ricketts, Trustee, to File Additional Objections to Claim of City of Lincoln.)

Comes now L. A. Ricketts, the duly appointed, qualified and acting Trustee in Bankruptcy of said bankrupt, and represents to the court as follows:

That heretofore the claimant, being the City of Lincoln, Lancaster County, Nebraska, being a municipality governed by a home ruled charter, filed its proof of claim herein in the principal amount of forty-five thousand dollars ($45,000), which claim was thereafter allowed at the first meeting of the creditors of said bankrupt, as a general claim; that thereafter said claimant filed an amended proof of claim alleging that it had a priority for the amount of said claim over and above other creditors, and that thereafter your Trustee filed objections to said amended claim, and a hearing was had thereon and the matter was duly submitted to the Referee, but that said matter has not as yet been decided by said court.

Your Trustee further sets forth as a fact and shows the court that subsequent to the submission of said matter the said City of Lincoln, claimant, has made settlement for the amount due to it from said bankrupt, and has been paid the amount due to it from said bankrupt by The Standard Accident Insurance Company of Detroit, Michigan, or some other insurance or bonding company, which company insured said claimant against any loss by reason of the deposit made by said claimant with the bankrupt, by reason whereof said claimant has elected to receive said payment from said Insurance Company in payment of its claim against said bankrupt, and is now estopped to assert any further claim against said bankrupt, and the said claim should therefore be disallowed.

Herefore, your Trustee prays that he be permitted to withdraw the submission of said matter, and that said submission be set aside, and that he be permitted to file an amended or supplemental objection to the said claim of the City of Lincoln and to offer evidence in support thereof, and for such other orders as may be proper in the matter.

R. A. BOEHMER,
Attorney for Trustee.

Received copy of the foregoing motion on this 6th day of February, 1934.

STEWART, STEWART & WHITWORTH,
Attorneys for Claimant.

Filed in Referee's Office at 5:30 P. M., Feb. 6, 1934. Filed in Clerk's Office as part of Transcript of Proceedings and Pleadings in Petition for Review at 1:50 P. M. June 12, 1934.

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21 (Objections of City of Lincoln to Motion of L. A. Ricketts, Trustee, to File Additional Objections.)

Comes now City of Lincoln, Nebraska, and hereby objects to the motion of the Trustee of the above named bankrupt for leave to withdraw a submission and to file additional objections to the claim of City of Lincoln and to adduce further evidence in support of said objections for the following reasons:

1. Said motion is insufficient in form or substance to entitle it to consideration.

2. The facts purported to be set forth in said motion are insufficient to justify the granting thereof.

3. Said motion fails to state any valid legal ground for the granting of said motion.

4. A hearing on said claim and the Trustee's objections thereto was duly held before the Referee on December 6, 1932, and the claim and the objections thereto were submitted to said Referee for his determination by brief filed by Trustee with said Referee on January 3, 1933.

5. At the time of the aforesaid submission of said claim and objections thereto the Referee by said Trustee as aforesaid, said Trustee had full knowledge of the alleged facts set forth in the aforesaid motion but took no action with reference thereto until the filing of the aforesaid motion on February 6, 1934 and by reason thereof said Trustee has been guilty of laches and is estopped from requesting leave to file additional objections and evidence in support thereof and withdrawing its submission.

Wherefore, claimant prays that said motion be denied.

CITY OF LINCOLN, NEBRASKA,
By Stewart, Stewart & Whitworth,
Its Attorneys.

State of Nebraska,
Lancaster County—ss.

Don W. Stewart, being first duly sworn upon his oath, deposes and says that he is one of the attorneys for the above entitled claimant, which is a municipal corporation, that he is acquainted with the matters and facts set forth in the foregoing objections and the same are true.

DON W. STEWART.

Subscribed in my presence and sworn to before me this 16 day of February, 1934.

(Notarial Seal) CHARLES B. PAINE,
Notary Public.

Filed in Referee's Office at 10:40 A. M. Feb. 17, 1934. Filed in Clerk's Office as part of Transcript of pleadings and proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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22 Order Sustaining Trustee's Motion to Set Aside Submission and to Introduce Further Evidence.

At Lincoln, in said District, this 21st day of February, 1934, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

The above cause coming on for hearing upon the motion of the Trustee filed February 6, 1934, for an order setting aside the submission of the issues raised by the claim of the City of Lincoln, Nebraska, and the objections filed thereto, and the objections filed by the City of Lincoln to said motion, and the same having been submitted to the Court, the Court finds, that the motion of the Trustee should be granted, and it is therefore Ordered, that the submission of the matter heretofore made be, and the same is hereby set aside and the objections of the claimant to said motion overruled, and the parties are authorized to submit such further evidence as they desire.

DANIEL H. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 5:00 P. M., Feb. 21, 1934. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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23 (Stipulation of Facts.)

It is hereby stipulated and agreed by and between L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, City of Lincoln, Nebraska, and Standard Accident Insurance Company, that the following is a correct statement of facts and the truth of such facts is hereby admitted by the parties hereto and shall be accepted as true in connection with the amended claim of City of Lincoln, Nebraska, and its motion to reconsider and set aside the allowance of said claim as a general claim and to allow such claim as a prior claim.

1. On September 26, 1928, Lincoln Trust Company as principal and said Insurance Company as surety executed and delivered to said City a bond wherein it was agreed the sum of Forty-five Thousand and no/100 ($45,000.00) Dollars then paid by said City to said Trust Company should be repaid to said City upon its demand. On or about June 15, 1932, said City demanded the repayment of said sum from said Trust Company, which said Trust Company failed to repay. Said City of Lincoln is a municipal corporation of the State of Nebraska, governed under a home rule charter.

2. On December 12, 1932, said City and said Insurance Company entered into an agreement whereby said Insurance Company agreed to pay and did pay said City the sum of $45,276.81 in satisfaction of its liability on the aforesaid bond and said City in consideration thereof agreed to assign to said Insurance Company the certificates in the amount of $45,000.00 delivered by said Trust Company to said City when the aforesaid payment was made by said City to said Trust Company and said City further agreed to and did assign to said Insurance Company all its rights arising out of the payment of said $45,000.00 to it by said Trust Company, including its claim and amended claim against said Trust Company, a bankrupt, in the sum of $45,000.00 with interest. L. A. Ricketts, Trustee in Bankruptcy of said Trust Company had knowledge of the foregoing settlement on December 12, 1932.

3. In the event only that the foregoing facts are received in evidence by the Referee, it is further stipulated and agreed that by reason of the facts heretofore set forth in this stipulation, said insurance Company is the assignee of the claim and amended claim of said City of Lincoln against the above named bankrupt in the sum of $45,000.00 and said City of Lincoln assigned all of its rights against said bankrupt to said Insurance Company, and said Insurance Company should be made a party to the proceedings relating to the allowance of said amended claim, and the parties hereto hereby consent that an order be entered by the Referee designating said Insurance Company as assignee of said claim and amended claim and making it a party to the foregoing proceedings.

4. It is further stipulated and agreed that all of the parties hereto reserve the right to object to any of the matters of fact herein stipulated on the ground of immateriality thereof.

24 The foregoing stipulation signed this 20 day of February, 1934.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company,
By R. A. Boehmer, His Attorney.

CITY OF LINCOLN, NEBRASKA,
By Max Kier, Lloyd E. Chapman,
Its Attorneys.

STANDARD ACCIDENT INSURANCE COMPANY,
Don W. Stewart,
By Stewart, Stewart & Whitworth,
Its Attorneys.

Filed in Referee's Office at 5:00 P. M. Feb. 21, 1934; Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review, at 1:50 P. M. June 12, 1934.

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25 Order Permitting the Standard Accident Insurance Company to be Made a Party to Said Matter.

At Lincoln, in said District, this 21st day of February, 1934, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

An order having been made sustaining the motion of the Trustee to set aside the submission of the claim of the City of Lincoln filed as a secured claim, and the objections filed thereto by the Trustee and permitting the introduction of further evidence, and the Trustee of the above named bankrupt having filed a stipulation signed by L. A. Ricketts, Trustee of the above named bankrupt, by his attorney, and by the City of Lincoln, by its attorney, and by the Standard Accident Insurance Company, by its attorneys, permitting an order to be made making the Standard Accident Insurance Company party to said proceedings in the matter of said claim, it appearing from such stipulation that the said Standard Accident Insurance Company paid to the City of Lincoln the sum of $45,276.81 in satisfaction of its liability on a bond given to said city and has become the assignee of said claim, and that said insurance company is now a proper party to said proceeding, it is

Ordered, that the Standard Accident Insurance Company, as assignee of said claim and amended claim be, and it

hereby is made a party to the foregoing proceeding in accordance with said stipulation filed.

DANIEL H. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 5:00 P. M. Feb. 21, 1934. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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26 (Order of Referee Disallowing Amended Claim of City of Lincoln Claiming Priority and Preference, and Directing that Order Allowing Claim as a General Creditor Entered August 16, 1932, be Approved and Confirmed.)

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

Case No. 2314.

At Lincoln, in said District, this 13th day of April, 1934, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

The above cause came on for hearing on the filing of an amended claim filed by the City of Lincoln on November 21, 1932, claiming as a priority creditor entitled to payment in full, after having first filed its claim as a general creditor on August 16, 1932, and having the same allowed as such in the amount of Forty-five Thousand Five Hundred Nine ($45,509.00) Dollars, same having been allowed on the same day of filing. The claim was later paid by The Standard Accident Insurance Company who insured the city against loss and by order made February 21, 1934, on stipulation between the parties, said insurance company as assignee of said claim was made a party as claimant in this proceeding. Said amended claim seeks priority payment alleging that the money in the sum of Forty-five Thousand ($45,000.00) Dollars paid over to the bankrupt constituted a trust fund to be held for the benefit of claimant, and was to be segregated and kept separate from other funds and that the bankrupt company failed so to do but wrongfully commingled the money with its own funds into a general fund and used the same for its own benefits and that thereby all of the assets of the bankrupt company coming into the hands of the Trustee should be impressed with a trust

in favor of the claimant and the same sold and claimant's claim paid in full before general creditors are paid. The Trustee objected to said claim on the ground that the city, having duly filed its claim as a general creditor, and had the same allowed such, and having filed no petition for review from the order allowing, and such order was in full force and effect and was a determination and an adjudication of the claim, and disposed of all of the rights of claimant; alleged that the trust certificates were issued to claimant as attached to claimant's general claim and that the bankrupt company paid the claimant interest on the money at the rate
27 of 3% per annum until March 26, 1932. Alleged that the money so received from the claimant was deposited in the general bank account in the general funds of the bankrupt company and that in the same fund there were a large number of other monies received from many persons, and that the monies were mingled with the general funds of the company and that in said account was also deposited, at the date of the adjudication in bankruptcy, money received from 233 persons who had deposited money in what was known as the Modern Investment Account in the sum of $28,133.78, and that a large number of other persons to the extent of the sum of $15,443.67, 138 in number, had deposited money for the payment of premiums on their life insurance under what was known as "Eltelic" accounts, all of which were deposited in the general bank account of the bankrupt company mingled with the general funds of said company, and that none of the monies received from claimant were ever carried in a trust account or segregated or carried by the bankrupt company as trust funds. The objections of the Trustee further allege, that the bankrupt operated what was known as a Trust Department which was used for the purpose of handling, managing, and controlling of estates of deceased persons and incompetent persons from which estates monies and a large number of securities were received and which were kept separate and segregated from the general funds and accounts of the company, and that the monies of claimant were not carried in such department and constituted no part of the funds in said department, and that such monies and securities in the trust department were held solely for the purpose of paying such trust estates and were not subject to lien or payment of claims of general creditors, and that the claimant's claim was that of a general creditor only.

There appeared for the claimant, Don Stewart and Max Kier, attorneys, and for the Trustee, R. A. Boehmer, attorney and the evidence was taken, and thereafter briefs were

filed and the cause submitted to the Court for determination.

28 The evidence shows that a voluntary petition for the adjudication of the Lincoln Trust Company, a bankrupt, was filed July 9, 1932, and an adjudication was had on the same day. It is admitted by stipulation, and the evidence shows, that the funds of the claimant were never, from the time of their receipt, about September 26, 1928, deposited, kept, segregated, or carried on the books of the company as a trust account, nor were they included in any of the assets or monies carried in what was known as the Trust Department, but were placed in the general funds of the Lincoln Trust Company and in the general bank account of said company and were mingled with the general funds of the bankrupt company and of many others, and were carried on the general records of the company as trust certificates outstanding. There is no evidence in the record that traces the funds of the claimant into the hands of the trustee, and in order to claim funds or property in the hands of the trustee in bankruptcy such funds must be traced directly into money or property coming into the hands of the Trustee, Re: Horigan Supply Company (C. C. A. 8th) 2 Fed. (2d.) 791; 5 A. B. R. (N. S.) 508. And the rule as to tracing trust funds into the hands of a Trustee is governed by the decisions of the Federal Courts and not State Courts; Mandel vs. Berton (C. C. A. 8th) 292 Fed. 127.

The evidence shows that the general bank account in which the money of the City of Lincoln was deposited was depleted from time to time and on July 8, 1932, the day before adjudication, it contained but $628.63, and that lowest amount prior to June 15, 1932, when the City of Lincoln demanded payment from the Lincoln Trust Company, was $7,875.97 on May 13, 1932. The evidence shows that the general fund was replenished from time to time from funds collected from investors and from money left in the Modern Investment Account and from parties paying in money to pay the premiums on their life insurance and from many other persons. Where a bank account in which funds obtained by fraud or are to be held in trust, are deposited, is exhausted before a claimant attempts to rescind or recover, the fact that it is replenished by money taken from other victims, gives such claimant no preference in the fund on theory of either a trust or
29 lien. Cunningham vs. Brown 265 U. S. 1; 3 A. B. R. (N. S.) 1. The instruments under which the money was turned over by the City of Lincoln to the Lincoln Trust Company, the bankrupt, were nine in number in the sum of $5,-

000.00 each and are dated September 26, 1928, and recite as follows:

"No. Lincoln, Nebraska, Sept. 26, 1928 No.....

This Is To Certify that the Lincoln Trust Company of Lincoln, Nebraska, holds for investment in Trust funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand & no/100 Dollars ($5,000.00) with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19.....

This Trust Certificate bears no per cent interest after maturity.

LINCOLN TRUST COMPANY,
By (S.) Howard Hadley, Secretary."

It will be noticed that the instrument is a negotiable one, payable on demand, and draws interest, and recites that the money is taken for investment and appears to be in the nature of a loan. It is contended by the claimant that the securities deposited with the Department of Trade and Commerce of the State of Nebraska in pursuance to Section 8-209 of the compiled Statutes of Nebraska for the year 1929, as shown by the stipulation offered in evidence, is liable for the claim of claimant, that this question is disposed of adverse to claimant. The statute says that this fund shall only be liable for obligations of the company as guardian, curator, executor, administrator, assignee, receiver, trustee, either by appointment of Court or under will, and for deposits of money in Court, and cannot be applied or used for any other debts or obligations until the aforesaid are paid. A deposit upon which interest is paid cannot be Special or in trust, but must be on the same footing with other unsecured demands. McNulta vs. West, Chicago Park 99 Fed. 900 (C. C. A.) In the case of State vs. Bartley 39 Neb. 353, 58 N. W. 172, and quoted in Re: State Treasurer's Settlement, (Neb.) 70 N. W. 532-538 it is held that a deposit of public moneys on which interest is paid is a loan or investment of the funds.

Claimant further contends that it is entitled to priority payment under Section 64b Paragraph 7 of the Bankruptcy Act granting priority to debts which, under the laws of the state or the United States, are given priority, not by any specific statutes, but under the common law that a debt due a sovereign is entitled to priority payment, the State of Nebraska by Section 49-101 of the compiled Statutes of Nebraska for the year 1929 having adopted so much of the common law that was not inconsistent with the constitution of the United States, the organic law of the state

or any law passed, or to be passed, by the legislature of the state.

The right of priority given the state by common law, where that right has been preserved to the state, is not affected by taking over debtor's property by a Trustee in Bankruptcy and such right can be asserted under Section 64b (7) of the Bankruptcy Act. State of Oregon vs. Ingram (9th C. C. A.) 63 Fed. (2d) 417; 22 A. B. R. (N. S.) 720. This then brings us to the question, does the state's prorogative pass to the City of Lincoln in this state? The Supreme Court of Nebraska has said that the power of the Courts to declare the established doctrines of the common law not inapplicable to the state, should be used sparingly. Meng vs. Coffee, 67th Neb. 50. This Court has further laid down the rule that it is the well established law of the state that in matters of strictly municipal concern, cities that have adopted the home rule charter under article two of the constitution, such as the City of Lincoln, are not subject to state legislation. Carlberg vs. Metcalf, 120 Neb. 481, 234 N. W. 87. That the sovereign right of the state does not pass to the political subdivisions, many Courts have so held. The case of Aetna Casualty & Guaranty Company vs. Bramwell, 12 Fed. (2nd) 307, held that this right was one of purely local law as construed by the highest court of the state, and that it was a right conferred only upon a state and did not apply to county or a political subdivision of the state which deposited funds in a bank, to entitle such county or political subdivisions to priority in absence of a statute conferring such right. In this case the Court also refers to the case of Denver vs. Stenger, (C. C. A. 8th) 295 Fed. 809, wherein it
31 was held that the right passed to the City of Denver under the Colorado law and says that this case does not now apply as the common law prerogative was later denied by the Supreme Court of the State of Colorado, citing United States Fidelity & Guaranty Company vs. McFerson, 241 Pacific 728. See also note 52 A. L. R. 756, 757. The case of Denver vs. Stenger, supra, seems to stand alone in holding that the right passes to political subdivisions of the State, and that court seems to infer in the opinion that the power had been expressly delegated to the city. The court says "A city is an agency of the state exercising the delegated sovereignty thereof in local matters". In the note to 51 A. L. R. 1339, the author says it is the general rule that the prerogative right does not extend to the political subdivisions merely because the right is given to the state. The only Nebraska case on the subject is the case of State ex rel

Spellman, Atty. General vs. S. S. Hadley Co., Bankers, School District of Boone County, intervener, being an opinion by Wilson, Commissioner, and unreported, in the Supreme Court #27751, filed June 16, 1931. The Court says:

"No authorities are cited from this state to sustain the contention that Nebraska possess the crown's common law prerogative to have its debts paid in preference to the debts of other creditors. In Freeholders of Middlesex Co. vs. State Bank, 29 N. J. Eq. 268, 271, in answer to the contention that the crown's prerogative was a part of the common law of New Jersey, it is stated and held: "It certainly has never received judicial approval, and, so far as my knowledge extends, no law officer of the state has ever attempted to enforce it. For over one hundred years as an actual, practical prerogative of government, it has neither been exerted nor recognized, and this circumstance, as a matter of contemporaneous and long-continued construction by all departments of the government, would seem to negative the existence of the right with a great emphasis." This doctrine has never been asserted, to our knowledge, in the sixty odd years of judicial history in Nebraska. "A prerogative which has remained so long practically useless can hardly be said to exist." Freeholders of Middlesex Co. vs. State Bank, supra."

There is no statute in the State of Nebraska conferring the right upon cities. The matter of the deposits by the City of Lincoln with the Lincoln Trust Company was strictly one of municipal concern in which no state right was involved and hence no prerogative right was vested in the city either by statute or the State's common law right. As to the Trustee's objection that the adjudication of the claim as a
32 general creditor, which order is in full force and effect, fully determines the city's claim and bars them from filing the amended claim, this contention should be disposed of against the Trustee, as it appears from Paragraph 6 of General Order 21 of the United States Supreme Court that power is given the Referee to reexamine the claims and reconsider a ruling.

The Court therefore finds, that the equities are in favor of the Trustee, and that the claim of the City of Lincoln is that of a general creditor only, and that the original order allowing it as a general claim should stand.

It is therefore ordered, that the amended claim filed claiming priority and preference be, and the same hereby is disallowed, denied, and expunged from the records in said

cause, and the order allowing the claim as a claim of a general creditor in the sum of $45,509.00 made August 16, 1932, is approved and confirmed and directed to stand as entered.

DANIEL H. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 4:00 P. M. April 13, 1934. Filed in Clerk's Office as Part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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33 (Petition of City of Lincoln for Review of Order of Referee.)

To the Honorable Daniel H. McClenahan, Referee in Bankruptcy:

Comes now City of Lincoln, Nebraska, a municipal corporation, and the Standard Accident Insurance Company, a corporation, and show to the court:

1. On or about August 16, 1932, City of Lincoln, Nebraska filed a claim against the above named bankrupt in the amount of $45,509.00.

2. On or about September 28, 1932, leave was given by the above named Referee to said City to amend its claim by claiming priority of payment and on November 21, 1932 said City filed an amended claim in the sum of $45,509.00, which it claimed was entitled to priority for the reasons stated therein. On December ...., 1932, the Trustee of the above named bankrupt filed objections to the allowance of said amended claim and on December 10, 1932, a hearing was held before said Referee on said amended claim and the objections thereto. Said City submitted its brief asking for allowance of said amended claim on December ...., 1932, and said Trustee submitted his brief in support of his objections on January 3, 1933.

3. On February 6, 1934, said Trustee made an application to file additional objections to the aforesaid claim and to introduce further evidence in support thereof. On February, 1934, said City filed objections to the aforesaid application of Trustee and on February 21, 1934, an order was entered by said Referee granting the aforesaid application of the Trustee. Thereafter, on February 21, 1934 further evidence was offered by said Trustee in the form of a stipulation of facts and it appearing therefrom that Standard Accident Insurance Company was liable as a surety to said City for the aforesaid claim and paid said City the amount

thereof on December 12, 1932, the said insurance com-
34 pany was thereupon made a party to said proceedings as assignee of said claim and amended claim.

4. On April 13, 1934, an order was entered by said Referee denying the right of said City and said Insurance Company to a priority in the payment of its claim and ordering that such claim should stand as a general claim against said bankrupt.

5. Said City and said Insurance Company complain of said order of April 13, 1934, as follows:

(a) The finding in the first paragraph on page 3 of said order that the funds of said City were never carried on the books of the bankrupt as a trust account is erroneous for the reason that the evidence shows that such funds were carried on the books of the bankrupt as a trust account.

(b) The finding in the first paragraph on page 3 of said order that there is no evidence that traces the funds of the claimant into the hands of the Trustee is erroneous for the reason that the evidence shows the lowest balance of cash items and cash on deposit including the funds in the "segregated assets account" up to bankruptcy was $12,979.42 on May 13, 1932 and it is the presumption that the funds passing to the trustee included such trust funds.

(c) The finding in the first paragraph on page 3 of said order that the rule as to tracing trust funds is governed by the decisions of the Federal Courts is erroneous for the reason that the bankruptcy act contains the specific provision that if the law of the state gives a priority then such priority shall be given by the bankruptcy court and the law of the State of Nebraska as construed by its courts gives claimant a priority under the facts existing.

(d) The finding in the second paragraph on page 3 of said order that the general bank account of bankrupt contained but $628.63 the day before adjudication, is erroneous for the reason the evidence shows that a separate account known as "Segregated assets account" was taken from the general bank account on June 15, 1932 in the amount of $44,982.46 of which $25,097.09 was on hand at the time of the adjudication of bankruptcy and which was a part of the general cash of the bankrupt.

(e) The finding in the second paragraph of page 4 of said order that the trust certificates issued by the bankrupt to said City were negotiable and in the nature of a loan is er-

roneous for the reason said certificates contain no words of negotiability nor indicating that the transaction was a loan but clearly show an agreement to hold the funds in trust.

(f) The finding in the second paragraph of paragraph 4 of said order that the securities held by the Department of Trade and Commerce of the State of Nebraska are not liable for payment of this claim is erroneous.

(g) The finding in the second paragraph on page 4 of said order that said trust certificates were in the nature of a loan is erroneous for the reason that even if a trust is not created by agreement of the parties, then the acceptance of funds as a mere deposit by the bankrupt, a trust company, was unauthorized and unlawful and a trust ex maleficio was thereupon created by law.

35 (h) The finding in the second paragraph of page 4 of said order that a deposit upon which interest is paid cannot be special or in trust, is erroneous for the reason that the rule stated applies only to deposits upon which interest must be paid under the law which was not true of the transaction involved herein.

(g) The finding in the last paragraph on page 6 of said order that the money paid by claimant to bankrupt was strictly one of municipal concern in which no state right was involved and no prerogative right was vested in the City either by statute or the state's common law right is erroneous for the reason the protection of a city's revenue and funds under the circumstances as shown by the evidence is one of state concern and City had a sovereign right to a priority in the protection of said funds.

(h) The finding in the next to the last paragraph of page 7 of said order that the equities are in favor of the Trustee and that the claim of the City is that of a general creditor only and that the original order allowing it as a general claim should stand, is erroneous for the reason the evidence shows that the equities are in favor of the City and that it is entitled to a priority and that the right of priority should be allowed said claimant.

(i) The finding in the last paragraph of page 7 of said order that the amended claim of claimant should be disallowed, is denied and expunged from the record is erroneous for the reason the said claim is entitled to be allowed as a prior claim.

(j) The conclusions of law contained in said order are erroneous.

(k) Said order is erroneous in not finding and determining that said amended claim should be allowed as a prior claim.

6. Said City and said Insurance Company complain of said orders of February 21, 1934, granting the application of the Trustee to file additional objections and introduce further evidence in support thereof and receiving further evidence as follows:

(a) Said application was insufficient in form or substance to entitle it to consideration.

(b) The facts purported to be set forth in said application were insufficient to justify the granting thereof.

(c) Said application failed to state any valid legal ground for the granting of said application.

(d) Said Trustee had full knowledge of the alleged facts set forth in his application before he submitted his objections to said Referee on January 3, 1933 but took no action until the filing of his application on February 6, 1934 and by reason thereof said Trustee was guilty of laches and was estopped from requesting leave to file additional objections and evidence in support thereof and from withdrawing its submission of its objections.

Wherefore City of Lincoln, Nebraska, and Standard Accident Insurance Company, feeling aggrieved because of the aforesaid orders of February 6, 1934 and April 13, 1934 pray that the same may be reviewed as provided by the
36 Bankruptcy Act and General Order 27 and that said Referee certify to the Judge of said court the questions presented in these proceedings together with the evidence and that it be decreed by said court that said orders were erroneous and that said amended claim should be ordered allowed as a prior claim against the above named bankrupt.

CITY OF LINCOLN, NEBRASKA,
A Corporation, and
STANDARD ACCIDENT INSURANCE COMPANY, a Corporation,
Don W. Stewart,
By Stewart, Stewart & Whitworth,
Their Attorneys.

State of Nebraska,
Lancaster County—ss.

Don W. Stewart, being first duly sworn upon his oath deposes and says that he is one of the attorneys for the above named claimants, which are corporations, that he is acquainted with the matters and facts set forth in the foregoing petition for review and the same are true.

DON W. STEWART.

Subscribed in my presence and sworn to before me this 2nd day of May, 1934.

(Notarial Seal) CHARLES B. PAINE,
Notary Public.

Filed in Referee's Office at 1:20 P. M. May 2, 1934. Filed in Clerk's Office, included in Transcript of Pleadings and Proceedings in Petition for Review, at 1:50 P. M. June 12, 1934.

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37 (Order of Referee Denying Portion of Petition for Review which Refers to Order of February 21, 1934, etc.)

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

Case No. 2314.

At Lincoln in said District this 11th day of June, 1934, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

The above matter came on for hearing on the petition for review filed by the City of Lincoln, Nebraska, and the Standard Accident Insurance Company, a Corporation, Assignee of said claim, filed May 2, 1934, and so much of said petition for review as is set forth in Paragraph 6 thereof purporting to be a review of an order made February 21, 1934, the prayer of said review however reciting an order of "February 6th", the Court Finds should be denied for the reason that said order was made upon a stipulation and agreement filed by and between the parties above named and the trustee, and the rules of this Court provide that a petition for review of an order of the Referee should be filed within twenty days after the order to be reviewed is made and therefore the complaint as to this order is out of time and should be denied.

Where a petition for review of an order of the Referee is not filed until after the time has expired as provided by the rules of the Court, the petition should be denied: Re Trottier 14 A. B. R. (N. S.) 192; 32 F. (2nd) 1010. That this rule is binding and must be adhered to is well settled. United States of America vs. Hines, Trustee (8th Cir.) 3 A. B. R. (N. S.) 132; 298 F. 853.

It is therefore Ordered, that so much of the petition for review as refers to the order made February 21, 1934 be
38 and the same hereby is disallowed and denied.

DANIEL N. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 3:30 P. M. June 11, 1934. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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39 (Certificate of Referee on Review.)

To The Honorable Judges of the United States District Court:

I, Daniel H. McClenahan, Referee in Bankruptcy, in charge of the above proceeding do hereby certify:

That in the course of said proceeding an order was made on April 13, 1934, denying the right of the City of Lincoln, Nebraska and the Standard Accident Insurance Company, Assignee, thereof, to a priority over general creditors of said bankrupt estate and directing that the order made on said claim under date of August 16, 1932 allowing said claim as a claim of a general creditor in the sum of $45,509.00 on such claim originally filed as a claim of a general creditor be allowed to stand. The claim was originally filed by the City of Lincoln under authority duly authorized by the City Council of the City of Lincoln, Nebraska as a general claim, and at a meeting of creditors duly held on August 16, 1932 an order was made allowing the claim as such and no review was taken from this order. On August 30, 1932 the City of Lincoln by and through its attorney filed a motion for an order to set aside the allowance of such claim as a general claim and asked leave to file an amended claim claiming priority over other creditors, to which the trustee objected, and after hearing an order was made on September 28, 1932 permitting the amended claim to be filed but not setting aside the original order allowing the claim as that of a general creditor, and on

November 21, 1932, the claimant, City of Lincoln, filed an amended claim claiming that the City should be entitled to priority over other creditors as the claim was for trust
40 funds which should have been segregated and kept separate from other funds of the bankrupt.

The evidence was taken, the matter briefed, and submitted for determination. The claim was paid by the Standard Accident Insurance Company who had insured the City of Lincoln against loss and the trustee on learning of this fact on February 6, 1934 filed an application to reopen the case and show this fact. On February 21, 1934 a stipulation and agreement was filed between the parties stipulating among other things that the Standard Accident Insurance Company had paid the City of Lincoln the sum of $45,276.81 in satisfaction of the claim and that the City of Lincoln had assigned their claim to the said Standard Accident Insurance Company, and on the strength of this stipulation and agreement of additional facts an order was made February 21, 1934 allowing the trustee to offer the additional evidence as stipulated and permitting the Standard Accident Insurance Company to be made a party to said matter as the assignee of said claim. On May 2, 1934 the City of Lincoln, Nebraska and the Standard Accident Insurance Company feeling themselves aggrieved by the order of April 13, 1934 and the order of February 21, 1934 filed a petition to review said orders setting up their errors in relation to both orders, the prayer of said petition for review however reciting that it is a review of an order of February 6, 1934. No petition for review of the order of February 21, 1934 was filed within the twenty days from the date of said order as provided by the rules of this Court and an order was entered denying so much of the petition for review as refers to that order.

That the errors complained of in connection with the order of April 13, 1934 are thirteen in number, being letters from A to K inclusive and are set forth in the petition for review.

That a summary of the evidence on which the said order of April 13, 1934 is based is as follows: That a portion of the evidence is stipulated as set forth in Exhibit 1 in the records.

The evidence shows that a voluntary petition for the adjudication of the Lincoln Trust Company, a bankrupt, was filed July 9, 1932, and an adjudication was had on the
41 same day. It is admitted by stipulation, Paragraph 3 of Exhibit 1, and the evidence shows, that the funds of the claimant were never, from the time of their receipt, about September 26, 1928 deposited, kept, segregated, or carried on the books of the company as a trust account, nor were

they included in any of the assets or monies carried in what was known as the Trust Department, but were placed in the general funds of the Lincoln Trust Company and in the general bank account of said company and were mingled with the general funds of the bankrupt company and of many others, and were carried on the general records of the company as trust certificates outstanding. The evidence in the record traces no funds of the claimant into the hands of the trustee.

The evidence shows that the general bank account in which the money of the City of Lincoln was deposited was depleted from time to time and on July 8, 1932, the day before adjudication, it contained but $628.63, and that the lowest amount prior to June 15, 1932, when the City of Lincoln demanded payment from the Lincoln Trust Company, was $7,875.97 on May 13, 1932. The evidence shows that the general fund was replenished from time to time from funds collected from investors and from money left in the Modern Investment Account and from parties paying in money to pay the premiums on their life insurance and from many other persons.

The instruments under which the money was turned over by the City of Lincoln to the Lincoln Trust Company, the bankrupt, were nine in number in the sum of $5,000.00 each and are dated September 26, 1928, and recite as follows:

"No. Lincoln, Nebraska, Sept. 26, 1928 No. .....

This Is To Certify that the Lincoln Trust Company of Lincoln, Nebraska, holds for investment in Trust funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand & no/100 Dollars ($5,000.00) with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19.....

This Trust Certificate bears no per cent interest after maturity.

LINCOLN TRUST COMPANY,
By (S) Howard Hadley,
Secretary."

The questions presented for review are:

1. Was the deposit in nature of a trust fund and if so is there evidence tracing the funds into the hands of the trustee, at the date of Bankruptcy, July 9, 1932?

2. Does the rule of the Federal Court as to tracing
42 trust funds into the hands of the trustee prevail or rule as interpreted by the Supreme Court of the State of Nebraska as contended by claimant prevail?

3. Does the City of Lincoln, Claimant, possess the Common Law prerogative, to have its debts paid first in preference to the other creditors by reason of being a political subdivision of the State, and therefore have priority under Paragraph 7 of Section 64-B of the Bankruptcy Act, and does their right pass to a surety who insures the City against loss?

4. Does the City of Lincoln come under the provisions of Section 8-209 of the Compiled Statutes of Nebraska for the year 1929, relating to the deposit of securities, to protect funds in the possession of Trust companies as guardians, administrators, executors, and trustees by appointment of Court or under will?

I hand up for the information of the Judges of this Court the following papers:

1. Claim of the City of Lincoln, Nebraska filed as a general creditor.

2. Order allowing claim as that of a general creditor which includes a large number of other claims.

3. Application of the City of Lincoln to amend claim to claim priority and to set aside allowance.

4. Objection of Trustee.

5. Order allowing City of Lincoln to file amended proof.

6. Amended claim of the City of Lincoln.

7. Objections of trustee to amended claim.

8. Reply of claimant to objections.

9. Motion of trustee to withdraw submission of issues and to offer additional evidence.

10. Objection of City of Lincoln to the application of the trustee to withdraw submission of issues.

11. Stipulation of additional facts and evidence and agreement between the City of Lincoln, Standard Accident Insurance Company, assignee, and trustee on motion to withdraw submission of issues.

12. Order sustaining trustee's motion to offer further evidence.

13. Order permitting Standard Accident Insurance Company to be made party as assignee of the claim of the City of Lincoln and amended claim.

14. Order denying claim of the City of Lincoln as a priority claim and directing former order of August 16, 1932, allowing claim as a general claim, allowed to stand.

15. Petition of City of Lincoln and Standard Accident Insurance Company to review order denying priority and order permitting trustee to offer additional evidence, offered by way of stipulation.

16. Order denying petition of review as to so much thereof as relates to order permitting trustee to offer additional evidence.

43 17. Brief of claimant City. Brief of Trustee. Reply Brief of City.

18. Transcript of evidence.

Dated June 12, 1934.

Respectfully submitted,

DANIEL McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 11:30 A. M. June 12, 1934.
Filed in Clerk's Office at 1:50 P. M. June 12, 1934.

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44 (Request of City of Lincoln and Standard Accident Insurance Company for Findings of Fact and Conclusions of Law by the District Court.)

Filed September 7, 1934.

To the Honorable Judge of the District Court of the United States, in and for the Lincoln Division of the District of Nebraska:

Come now the City of Lincoln, Nebraska, and the Standard Accident Insurance Company and request the court to make the following special findings of fact and conclusions of law:

Findings of Fact.

1. On September 29, 1928, the City of Lincoln, in the State of Nebraska, a municipal corporation, paid to the Lincoln Trust Company $45,000.00 which was to be held in trust for said city.

2. The money was placed by said trust company in its general bank account and augmented the general assets of said trust company. It was carried on the books of the trust company under the heading of "Trust Certificates".

3. On June 14, 1932, the city demanded repayment of said sum which was refused by the trust company and said trust company has paid no part thereof to said city.

4. That said trust company was adjudicated a bankrupt on July 9, 1932, and its assets then passed to the trustee in bankruptcy herein.

5. A claim was duly filed by said city for said $45,000.00 and thereafter said claim was duly amended to include a claim of priority in payment and said city was entitled to priority in payment before the other creditors of the bankrupt are paid.

6. Said city was paid the amount of its claim by Standard Accident Insurance Company, surety on a bond for the repayment of said $45,000.00, and said city's claim was duly assigned to said insurance company which is entitled to all the rights of said city, including the right to priority, as aforesaid.

45 Conclusions of Law.

1. The $45,000.00 paid by said city to the Lincoln Trust Company was to be held in trust for said city and constituted a trust fund.

2. Said city being a municipal corporation and an agency of the state of Nebraska, is entitled to the sovereign right of the state of Nebraska to payment of its claim prior to the payment of the claims of general creditors.

3. Said city was entitled to priority under the provisions of Section 64b of the Bankruptcy Act, which allows a priority where such priority exists under the laws of the state and, by Section 49-101 of the C. S. of Nebr. for 1929, the common law was adopted as the law of Nebraska. The common law, as construed by the courts of Nebraska, requires only proof that trust property augmented the general assets in order to secure a priority.

4. The Standard Accident Insurance Company, as surety, for the repayment of said $45,000.00, upon payment thereof to said city and assignment by said city to said insurance company of its rights and claim became entitled to all of the rights of said city and is entitled to payment of said sum of $45,000.00 prior to the payment of the claims of general creditors.

CITY OF LINCOLN, NEBRASKA,
AND STANDARD ACCIDENT
INSURANCE COMPANY,
By Don W. Stewart, Its Attorneys.

46 (Opinion of District Court of October 8, 1934.)

Filed Oct. 8, 1934.

Donohoe, D. J.

Under the undisputed facts in this case, it would seem that the nature and status of the claim of the City of Lincoln was fully determined and established by the decisions of the Circuit Court of Appeals of this Circuit.

In the case of the City and County of Denver vs. Stenger, 295 Fed. 809, involving a claim growing out of almost indentical facts, and where a similar statute with reference to the common law was in force, the Court held that the claim was entitled to the priority accorded a debt due the sovereign under the common law, and held that the rule covered all manners of debts due the State, whether the origin of such be in voluntary imposts or voluntary obligations. The claim being in the nature of a trust or special deposit, the federal rule in regard to tracing trust funds we think applies. This does not involve any rule of property or construction of a state statute, but merely a principle of equity. Mandel vs. Burton, 292 Fed. 127.

In this case there is no dispute but that the funds of the City of Lincoln was received by the Trustee, and commingled with other property, and so lost its identity. In the case last above cited, Judge Kenyon, speaking for the Court, announced the rule:

47 "Where trust property is commingled with other property, so as to lose its identity, it is not, of course, necessary to do the impossible thing, and identify it or lose the lien; but it must appear in order to have any basis for a lien, that the property in the hands of the trustee * * * included in its mass, either the very thing parted with, or its proceeds."

From the evidence it appears that the commingled funds were never at any time exhausted or paid out, and consequently the rule announced by Judge Munger in the case of Peoples National Bank vs. Moore, 25 Fed. (2d) 599, applies, and which is as follows:

"If the trustee mingles money belonging to the trust estate with his own funds, and then pays out some of the funds, it will be presumed that he did that which was lawful, and therefore made his payments out of his own portion of the funds."

We consequently conclude that the City of Lincoln is entitled to priority for the lowest balance prior to bankruptcy,

(Schumacker vs. Harriett, 52 Fed. (2d) 814) which we hold includes cash on hand, cash items, and cash in bank account on May 13, 1932, all of which amounts to the total sum of Twelve Thousand Nine Hundred Seventy-nine Dollars and Forty-two Cents ($12,979.42).

The Order of the Referee will therefore be reversed, and the claimant, City of Lincoln, given priority on its claim to the extent of Twelve Thousand Nine Hundred Seventy-nine Dollars and Forty-two Cents ($12,979.42). The Conclusions of Law and Findings of Fact will be entered in keeping with this Memorandum, and counsel for the claimant will prepare the necessary papers. An exception will be allowed the trustee.

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48 (Order of District Court for Withdrawal of Opinion of October 8, 1934, and for Substitution of New Opinion.)

Filed and Entered at 8:30 A. M. Dec. 12, 1934.

Since the preparation of our Memorandum Opinion, which was filed herein on the 8th day of October, 1934, we have been favored with additional Briefs on behalf of the parties, and have had an opportunity to make a more exhaustive examination of the authorities, in view of which we are now convinced and persuaded that the said Memorandum Opinion should be withdrawn and modified;

It Is Therefore Ordered, that the said Memorandum Opinion filed herein on the 8th day of October, 1934, be and the same hereby is withdrawn, and the Memorandum Opinion, which is hereto attached, substituted in lieu thereof.

By the Court,

J. A. DONOHOE,
United States District Judge.

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49 (Substituted Opinion of District Court.)

Donohoe, D. J.

The facts as shown by the record are that about September 29, 1928, the City of Lincoln issued its check to the order of the Lincoln Trust Company for $45,000.00, which was duly paid, for which the Trust Company issued to the City nine certificates of $5,000.00 each in form as follows:

"No..... Lincoln, Nebraska, September 26, 1928. No.....
This is to certify that the Lincoln Trust Company of Lin-

coln, Nebraska, holds for investment in Trust, funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand and no/100 Dollars ($5,000.00) with interest at three per cent per annum payable quarterly from date until returnable to owner on demand.

This Trust Certificate bears no per cent interest after maturity.

LINCOLN TRUST COMPANY,
By Howard Hadley, Secy."

Interest at 3% was paid to and including the interest payment of March 26, 1932. At the time of the receipt of the city's money, the Trust Company carried all of its funds in its general bank account. While at that time the Company kept separate records in its Trust Department from its general records, this transaction was at all times carried on the general records of the Company, and was never shown as a liability of the Trust Department.

On October 3, 1931, the Trust Compay had trust liabilities of the Trust Department consisting of uninvested balances, cash on hand, and other administrator, executor and guardian accounts, which no doubt were trust funds held by them in trust as administrator, executor and guardian, in an amount of approximately $49,679.17, and on that day there was transferred from the general bank account of the Company to the Trust Department bank account, the foregoing amount. Prior to this date, the company had no separate bank account for Trust Department funds.

The money paid by the City to the Trust Company was carried on the general books of the company listed as Trust Certificates, but the cash was placed in the general bank account. It was so carried under the heading "Trust Certificates" from the time it was paid to the Trust Company until its closing. When the separate bank account for trust funds was started in October, 1931, the money that had been paid in by the city was not transferred to the Trust Department bank account. The company was adjudicated a bankrupt on July 9, 1932.

On or about June 14, 1932, the City made demand for payment to it of the moneys paid to the Trust Company on September 29, 1928. The lowest balance that the Company had in its general bank account up to June 15, 1932, the day after the demand, was on May 13, 1932, at which time the Company had in its general bank account $7,875.97, and cash on hand and cash items, $5,193.45. On June 15, 1932, another

account was set up on the Trust Department books designated as "Segregated Assets" which totalled approximately $44,-982.46, and funds in that amount were taken from the general bank account of the Trust Company and transferred to the Trust Department bank account. This was done for the reason that between April 7, 1932, and June 15, 1932, the Company had received items of principal payment and interest due to persons for whom the Company had collected principal and interest on loans and some payments made between April 7, 1932, and June 15, 1932, on what were known as Eltelic contracts. A sufficient amount of money was taken out of the general bank account, to-wit: approximately $44,-982.46, and deposited in the Trust Department bank account to cover those items and this fund is referred to in the record as the "Segregated Assets" fund. At the time the Company closed on July 9, 1932, there was a balance in the "segregated asset" fund, $25,097.09, which was turned over to the receiver and subsequently to the trustee in bankruptcy.

The lowest balance of cash on deposit in bank, cash on hand, and cash items in the general bank account of the trust Company after June 14, 1932, to the date of bankruptcy was on July 8, 1932, at which time there was actual cash in bank, $629.63, and cash on hand and cash items, $1599.00, which also passed to the Trustee in Bankruptcy.

The Company also received money from persons deposited for investment to whom it issued receipts which were entitled "Modern Investments", and these funds were at all times placed in the general bank account, and were never transferred to the Trust Department nor the Trust Department bank account. It likewise received funds on what it denominated "Eltelic" contracts which were deposited in the general bank account and never transferred to the Trust Department or the Trust Department bank account except as above stated, and also received money from other sources all of which were deposited in the general bank account and never transferred to the Trust Department or Trust Department bank account. Out of the general bank account, the Company paid its own expenses of general operations of its business and any other items that came up, and they were in no way connected or related with the funds segregated or deposited in the Trust Department. While the record is not as clear on this and many other points as might be desired, the testimony also shows that from about October 1928, to the date of bankruptcy the daily deposits varied from $5,-000.00 to $50,000.00.

The City first makes claim of priority of payment out of the assets of the bankrupt estate under Section 64b of the Bankruptcy Act, which insofar as is pertinent to this case provides as follows:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (7) debts owing to any person who by the laws of the States or the United
51 States is entitled to priority: Provided, That the term "person" as used in this section shall include corporations, the United States and the several States and Territories of the United States."

The claimant contending that the State of Nebraska adopted the common law of England and under the common law the City as an agency of the State, is entitled to priority of payment of its debt, by virtue of its prerogative right as a sovereign, and that subdivision (7) of Section 64 b of the Bankruptcy Act provides for priority of payment in advance of dividends to "debts owing to any person who by the laws of the States or the United States is entitled to priority:" Relying principally upon the cases of: City and County of Denver vs. Stenger, 295, Fed. 809; Marshall vs. New York, 254 U. S. 380; 65 L. Ed. 315; 41 Sup. Ct. Rep. 143; Fiman vs. State of So. Dakota, 29 Fed. (2d) 776.

From a numerical standpoint the weight of state authority is that in those states which have adopted the common law of England by reason of such adoption the states as sovereigns in the absence of some legislation otherwise fixing priority of payment, are entitled to such priority of payment. See notes in 51 A. L. R. 1355; 65 A. L. R. 1331; 90 A. L. R. 184; 46 L. R. A. (ns) 260.

Whether a state [of] virtue of its sovereignty is entitled to priority of payment and whether the priority enjoyed by the state is a prerogative right [of] merely a rule of administration is entirely a matter of local law. The decisions of the highest court of the state as to the existence of the right and its incidents will be accepted by the federal courts as conclusive. Marshall vs. New York, supra. It being merely a matter of local law, if the courts of the state have decided that the state or its municipal subdivisions do not have as sovereigns the prerogative right of priority, such decisions are binding and conclusive upon the federal courts. In the absence of a decision by the state courts, the federal courts will determine the question as a matter of general law. In the Stenger case supra, the circuit court of appeals of this circuit in a case

arising in Colorado before the state courts of Colorado has passed upon the question, held that the City of Denver as an agency of the state, Colorado having adopted the common law, was in an ordinary receivership proceeding, entitled in virtue of the sovereignty of the state which was likewise in the city, to priority of payment against general creditors.

Marshall vs. New York, supra, discusses the question fully. The first constitution of the State of New York (adopted in 1777) provided that the common law of England, which together with the statutes constituted the law of the colony on April 19, 1775, should be and continue the law of the state, subject to such alterations as its Legislature might thereafter make. This provision was embodied in the later New York Constitutions. The courts of New York decided that, by virtue of this constitutional provision, the state, as sovereign, succeeded to the crown's prerogative right of priority, and that the priority was not limited to amounts due for taxes. The decision in Marshall vs. New York, does no more than to give effect to the decisions of the courts of New York on the question.

If the Supreme Court of Nebraska has determined that the state or its municipal subdivisions did not succeed as sovereigns to the prerogative right of priority of payment by the adoption of the common law, then there is no law in Nebraska, statutory or common law which gives priority under Subdivision (7) of 64 b to "debts owing to any person who by the laws of the States * * * is entitled to priority".

In the case of State of Nebraska, ex rel Spillman vs. School District No. 6 of Boone County, in an unreported opinion filed June 16, 1931, claim was made by the School District
52 for priority of payment against the receiver of a failed state bank. The School District contended that under the common law of England, the King was entitled to be paid out of the assets of his debtor subjects in preference to other creditors, and that such preferential rights were adopted in Nebraska by the adoption of the common law. The Commission held however, that the rule obtaining in many states that by the adoption of the common law of England, the states succeeded to the sovereign right of priority of payment, did not obtain in Nebraska. It is true that by virtue of express statute "such proceedings (of the Commission) shall not be published in the reports of the court or in any other reports and shall establish no precedent and be authority only in that particular case." Sec. 2, Chap. 76 Laws of 1925.

Under the law of Nebraska, the Commission merely makes recommendations and the judgment in proceedings before the Commission is rendered by the court. As hereinbefore stated, if the Supreme Court of Nebraska had determined the question, such determination would be binding and conclusive upon the federal courts, and while the proceedings before the Commission approved by the judgment of the court, may not be conclusive, we feel that such holding and judgment should be considered at least persuasive of what the rule is in Nebraska, until the court itself holds otherwise.

However, even tho the Supreme Court of Nebraska, had held that the State and its municipal subdivision were entitled to the prerogative right of priority in ordinary cases, it does not follow that the city is entitled to priority in Bankruptcy. Whether or not a municipal subdivision of a state is entitled to priority must be determined by the provisions of said sub-division (7) Section 64 b.

In the case of Guarantee Title & Trust Company vs. Title Guaranty & Surety Company, 224 U. S. 152, 32 Sup. Ct. Rep. 457, 56 L. Ed. 706, the Supreme Court of the United States, held that the bankruptcy act takes into consideration the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment, and notwithstanding that a general statute of the United States gave the United States priority of payment in ordinary cases of insolvency, and in cases of deceased debtors, unless the Bankruptcy Act itself gave it, there was no such right of priority in Bankruptcy. In other words, that the provisions of the Bankruptcy Law, fixing the order of priority governs in bankruptcy cases as against a general statute of the United States or of statutes or common law of the states providing for priority of payment.

Prior to the amendment of 1926, Sec. 64 b provided that the debts to have priority and to be paid in full out of the bankrupt's estate and the order of payment shall be "(5) debts owing to any person who by the laws of the States or United States, is entitled to priority." In the case of Davis vs. Pringle, 268 U. S. 315, 45 Sup. Ct. Rep. 549, the United States claimed priority of payment over other creditors, the claim being that under a Federal Statute, the United States was given priority of payment and therefore the United States was a person given priority under said subdivision (5) as "debts owing to any person who by the laws of the United States is entitled to priority." It was argued by the government that because Sec. 1, subdivision (19) of the Bankruptcy Act, provides that "persons" shall include corporations",

that the United States was a corporation and within the word "persons". The Supreme Court held however, that altho the United States was by general statute given priority of payment, the Bankruptcy Law itself provided a complete scheme and order of priority of payment, and that the United States could not come in under the provision giving priority of payment to "any person who by the laws of the
53 United States is entitled to priority", holding that it was neither a person nor corporation.

Evidently to remedy the situation pointed out in the Pringle case, and to provide for priority to the United States and the States and Territories, Sec. 64 (a) was amended, the subdivisions renumbered and former subdivision (5) of 64 b is now subdivision (7) of 64 b, and provides for priority in advance of the payment of creditors as follows:

"Debts owing to any person who by the laws of the States or the United States is entitled to priority: Provided, that the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

It will thus be seen that the only change made was by adding the proviso that the term "person" shall include corporations, the United States and the Several States and Territories of the United States. Assuming therefore, that it were the laws of Nebraska, that debts due the state, its cities, and other municipal subdivisions were entitled to priority of payment in virtue of the sovereign right or for any other reason, the question still is, have municipal subdivisions of the state, been included in the right to priority contained in subdivision (7) of Sec. 64 b as amended?

While this particular subdivision of the statute should be given a liberal construction, Wheeler vs. Johnson, 26 Fed. 2d, 455, we find nothing in it which by the most liberal construction given priority of payment to a city or any other municipal subdivision of the state. If this were a debt due the state, it would plainly be within the 1926 proviso that persons shall include the state because it says so. Congress failed, however, to say that the word "persons" should include cities, counties, school districts or other municipal subdivisions or agencies of the state. It is fair to assume that when Congress used the word "person" and "corporations" in subdivision (7), it intended that "person" and "corporations" means such as are defined in the Bankruptcy Act, except in the case of the "United States and the several States and Territories of the United States", which Congress has specifically provided shall be included within the word "per-

son". The definition of "persons" in subdivision (19) of Section 1 of the Bankruptcy Act is not in our judgment broad enough to cover municipal subdivision of the state. That definition is as follows:

" 'persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations;"

Nor is a municipal corporation included within the term corporations. Subdivision (6) of Section 1 of the Act defining corporations provides that;

" 'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the associations, and any business conducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument."

54 There certainly is nothing in this definition which by the most liberal construction could be said to include a city or municipal corporation.

Again, altho the proviso includes in the term "person" "the several States", by no stretch of the imagination can the word "States," be held to mean municipal corporations. States are defined in subdivision (24) of Paragraph 1, as follows:

" 'States' shall include the Territories and possessions to which this Act is, or may hereafter be, applicable, Alaska, and the District of Columbia;"

Paragraph a of Section 1, provides:

"The words and phrases used in this Act and in proceedings pursuant thereto shall, unless the same be inconsistent with the context, be construed as follows:"

then follow many definitions including the ones heretofore referred to.

We find nothing in the definitions of "persons", "corporations", and "States" as found in said Section 1, which is inconsistent with the context of 64 b (7) and therefore such

definitions should control, except as stated. So holding, it is clear enough that a municipal corporation cannot be brought within either of the words "person", "Corporations" or "States" found in subdivision (7) of 64 b.

The case of City of Denver vs. Stenger, supra, is not determinative of this case for at least two reasons, namely:

1. We feel that some weight should be given to the fact that the supreme court commission, and the supreme court by its judgment, determined that municipal subdivisions of the state were not entitled to priority in virtue of any prerogative of sovereignty and

2. The Stenger case was an ordinary case of insolvency and receivership and the special provisions concerning and governing priority of payment contained in the Bankruptcy Act were not before the court.

Fiman vs. State of South Dakota, supra, also relied upon by the city has no application. That was a case in which the state was claiming priority in virtue of its sovereign right and while the circuit court of appeals in this circuit recognized the rule laid down in the case of the City of Denver vs. Stenger as applicable in ordinary cases of insolvency, it also held that in view of the fact that the National Banking Act provided a complete scheme of distribution of the assets of the bank, such legislation is controlling over any general rule or statute in a state giving priority. So is the Bankruptcy Act in cases in Bankruptcy.

Marshall vs. New York, supra, is not controlling because as heretofore pointed out it does no more than recognize as binding upon the federal courts the decision of the courts of New York on the question of prerogative right of priority of payment. There was not involved in it any question of priority in bankruptcy.

A case sustaining these views is that of In re C. O. Pick Co et al., 9 Fed. 2d, 207. The question before the Court was whether debts due the State Industrial Accident Fund were entitled to priority of payment under 64 b prior to the amendment of 1926 over debts due general creditors of the bankrupt. The state law provided that the amounts due such fund should be deemed prior claims in all bankruptcy proceedings, and while the court held that the Commission was an agency of the state for the discharge of governmental functions, nevertheless it was held to be neither a person nor a corporation as defined by the Bankruptcy Act. So it is clear enough that prior to the amend-

ment of 1926 neither the United States, the states, nor its municipal subdivisions of agencies were within the terms "person" or "corporation". There is nothing in the proviso or amendment of 1926 "that the term 'person' that include corporations, the United States and several States and Territories of the United States", which indicates that it was intended to or does broaden the Act sufficiently to permit the inclusion of cities or other municipal subdivisions or agencies of the state.

The holding in the case of In re Ireland 4 Fed. 2d, 813, seems to be contrary to the holding in the Pick case, but the latter more nearly accords with our view of the correct construction of the Act.

Another contention of the city is that aside from its right of priority as a sovereign the city is entitled to priority because Nebraska had adopted the common law and under the common law as construed by the Supreme Court of Nebraska, trust funds which have augmented the assets of the trustee are entitled to priority. If this contention is sound the city would be entitled to priority of payment to the full amount of its claim, without being required to trace its monies into a particular fund or piece of property which came into the hands of the trustee. This contention cannot be sustained. The rule of law with respect to tracing trust funds does not involve any rule of property or the construction of a state statute but is merely a principle of equity. Hence the decisions of the federal courts must govern rather than the decisions of the courts of the state. Mandel vs. Burton, 292 Fed. 127.

The City's next contention is that it is entitled to priority in payment at least to the extent of the lowest balance in the fund into which it has traced its money on the ground that the funds were trust funds by express contract, or if by reason of the agreement in the contract to pay interest, the transaction is treated as a deposit, it would still be a trust fund on the ground that the trust company had no authority under the laws of Nebraska to receive deposits and therefore in so receiving it as a deposit, the bankrupt became a trustee ex maleficio.

There is considerable doubt whether, taking the contract as a whole, it created a trust relation. It is true that the contract in terms states that the "Company holds for investment in Trust, funds belonging to the City Treasurer of Lincoln, Nebraska". Were nothing more shown than the fore-

going provision of the contract there would be little doubt that the funds were received and held as trust funds. But the agreement to pay interest seems entirely inconsistent with the relation of principal and agent or bailor and bailee or trustee and cestui que trust. It seems to be an anomaly that an agent having no authority to use his principal's money except to invest it in accordance with the directions of his principal would agree to pay interest for the privilege of accepting the burden of agency. The same is true of the relation of bailor and bailee or Trustee and cestui que trust. It is exceedingly unusual to pay for the privilege of accepting a burden instead of a benefit. As said in the Nebraska case of In re State Treasurer's Settlement, 70 N. W. 532-538, quoting from State vs. Bartley, 39 Neb. 353, 58 N. W. 172:

"Whoever heard * * * of a banking institution paying the privilege of holding a special deposit of funds?"

Ordinarily the agreement to pay interest is strongly indicative of a loan of a deposit rather than a bailment or an agency. However, there is nothing whatever in the record to indicate the true nature of the transaction except the contract itself and the fact that interest was paid, and the further fact that the trust company apparently felt perfectly free to use the money, in any manner it saw fit. There are cases holding that where interest is paid, either as a matter of agreement or where interest is required to be paid
56 by law, the transaction is necessarily a loan and not a bailment. See among others, McNulta vs. West, Chicago Park Com'rs, 99 Fed. 900; In re State Treasurer's Settlement, 70 N. W. 532-538, State vs. Bartley, 39 Neb. 353, 58 N. W. 172, cited in the opinion of the Referee. The last cited cases, however, are not conclusive as applied to the facts in this case, as there was not in the cited cases, as there is in the instant case, an express provision or declaration that the funds are held in trust. It is also well settled that a contract must be construed as a whole and its true character determined from the instrument and all the facts and circumstances surrounding it. It is possible for people to do the unusual, and there may have been reasons not disclosed by this record why the trust company was willing to assume the burdens of caring for trust monies and paying for the privilege. In the absence of decisive authority on the question we conclude with some misgivings, that the positive provisions of the contract reciting that the funds were held in trust for investment are not overcome by the agreement to pay interest.

The next question therefore is, how much of the funds that were turned over to the receiver and trustee in bankruptcy

may the city claim as impressed with a trust, or upon which they have an equitable lien? In the case of Empire State Surety Co., vs. Carroll County, 194 Fed. 593-604, in an opinion by Judge Sanborn the rule with reference to tracing trust funds is stated as follows:

"(1) It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust propery or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof, which came to the hands of the receiver. Peters vs. Bain, 133 U. S. 670, 694, 10 Sup. Ct. 354, 33 L. Ed. 696; Spokane County vs. First Natl. Bank, 68 Fed. 979, 982, 16 C. C. A. 81, 84; Board of Com'rs vs. Patterson (C. C.) 149 Fed. 229; Frelinghuysen vs. Nugent, (C. C.) 36 Fed. 229, 239; Board of Com'rs vs. Strawn, 157 Fed. 49, 51, 84 C. C. A. 553, 555, 15 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225, 7 Ann. Cas. 551; Cherry vs. Territory, 17 Okl. 213, 89 Pac. 190; St. Louis Brewing Assn. vs. Austin, 100 Ala. 313, 13 South. 908; Little vs. Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570; Howard vs. Fay, 138 Mass. 109, 23 N. E. 1005, 7 Brigham, 142 Mass. 248, 7 N. E. 851; Erie Ry. Co. vs. Dial, 140 Fed. 689, 72 C. C. A. 183; Ferchen vs. Arndt, 26 Or. 121, 37 Pac. 161, 29 L. R. A. 664, 46 Am. St. Rep. 603; Blake vs. State Savings Bank, 12 Wash. 619, 41 Pac. 909, 910; In re North River Bank, 60 Hun. 91, 14 N. Y. Supp. 261; Williams vs. Van Norden Trust Co. 104 App. Div. 251, 257, 93 N. Y. Supp. 821; Bishop vs. Mahoney, 70 Minn. 238, 73 N. W. 6; Nonotuck Silk Co. vs. Flanders, 87 Wis. 237, 58 N. W. 383; Burnham vs. Barth, 89 Wis. 362, 366, 62 N. W. 96; Bradley vs. Chesebrough, 111 Iowa 126, 82 N. W. 472; Lebanon Trust & Safe Deposit Bank's Assigned Estate, 166 Pa. 622, 31 Atl. 334; Marquette Fire Com'rs vs. Wilkinson, 119 Mich. 655, 670, 78 N. W. 893, 44 L. R. A. 493; Hauk vs. Van Ingen, 196 Ill. 20, 39, 63 N. E. 705; Ellicott vs. Kuhl, 60 N. J. Eq. 333, 46 Atl. 945; Ober vs. Cochran, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118; In re Mulligan (D. C.) 116 Fed. 715, 717, 718; Holmes vs. Gilman, 138 N. Y. 369, 376, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463; In re Hicks, 170 N. Y. 195, 198, 63 N. E. 276.

"(2) Proof that a trustee mingled trust funds with his own and made payments out of the common fund is a suf-

ficient identification of the remainder of that fund coming to the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling (Board of Com'rs. vs. Strawn, 157 Fed. 49, 51, 84 C. C. A. 553, 555, 15 L. R. A. (N. S.) 1100; Weiss vs. Haight & 57 Freese Co. (C. C.) 152 Fed. 479; American Can Co. vs. Williams, 178 Fed. 420, 423, 101 C. C. A. 634, 637) as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other property of the trust fund, but kept it sacred (Board of Com'rs. vs. Patterson (C. C.) 149 Fed. 229, 232; Spokane County vs. First National Bank, 68 Fed. 979, 16 C. C. A. 81)."

The rules as thus stated has been many times followed and reiterated in this circuit. Applying the foregoing rule to the facts in this case we find that the city's money was originally deposited in the trust company's general bank account, and mingled with other monies belonging to the bankrupt and others.

On October 3, 1931, there was withdrawn from the general bank account $49,679.17, which were funds that the bankrupt held in a trust capacity such as executor, administrator, and the like, and that amount was deposited in the trust department bank account, an account and fund separate and apart from the general fund bank account. It is perhaps unnecessary to discuss this transaction as the city nowhere in its briefs makes any claim of a lien upon this fund, and in the petition for review no error is assigned of the failure of the Referee to give the city a lien upon this fund. However, in view of the fact that the Referee held that the city's money was not held in trust, and we have held otherwise, this item should perhaps be discussed.

We do not think that the claimant is entitled to make any claim against any balance in the fund carried in the trust department bank account to cover monies held as administrator, etc., for the following reasons: The testimony is that up until October 3, 1931, all of the bankrupt's money was carried in its general bank account, and that city's money had been deposited therein. That on October 3, 1931, there was withdrawn, $49,679.17. The testimony is that the city's money was not withdrawn from the general bank account and deposited in any trust fund bank account at that time because there was not enough money segregated, whatever that may mean. It is indispensable to the maintenance by the city of a claim to preferential payment that clear proof be made that its trust property went into the fund withdrawn on October 3, 1931, and then the claim can be sustained to that

fund only to the extent that its money went into it. It will be presumed that when the bankrupt withdrew from the general bank account this $49,679.17, it respected the city's trust fund as it then existed and withdrew only monies not impressed with the trust. Empire State Surety Co. vs. Carroll County, supra; Peoples National Bank vs. Moore, 25 Fed. 2d, 599. Assuming that the bankrupt commingled two trust funds, had it paid one of the cestui que trustents, it would be presumed that the bankrupt paid the one in the legal order of priority of payment. Likewise when the bankrupt took from the commingled fund the funds of one cestui que trustent and placed those funds in a separate fund for his benefit, it will also be presumed that the trustee segregated the commingled trust funds in strict accordance with the legal rules applicable to separation of commingled trust funds.

Neither is the city entitled to a lien or to claim as trust any part of the $25,000.00 which was turned over to the trustee and which was the balance at the date of adjudication in what is called the "segregated asset" account. As heretofore shown this account arose in this way. Between April 7, and June 15, 1932, collections of principal and interest and on so-called Eltelic accounts were made from various persons to the extent of $44,982.46 and the proceeds deposited in the general bank account and on June 15, 1932, the last mentioned amount was withdrawn from the general bank account, and placed in the trust department bank account or trust funds to cover such collections. The source from which this $44,892.46 came from is undisputed. It was monies of others which was placed in the general fund bank account between April 7 and June 15, 1932, and not a part of the city's
58 money, and whether the money which was placed in the general bank account between April 7, and June 15 was the money of the bankrupt or others is immaterial. If at the time this sum was deposited and withdrawn, the trust fund had been depleted, the trust claimant is not entitled to a lien upon the funds thus replaced in the account. The rule is thus stated in 65 C. J. 976-7:

If the mingled fund is, at any time, reduced to below the amount of the trust fund, it will be regarded as dissipated to that extent so that the limit of the cestui que trust's recovery will be the lowest amount to which the fund has been depleted, and sums subsequently added to the fund from other sources will not be treated as a part of the trust fund" • • •

Citing a number of state and federal cases including decisions of the Supreme Court of the United States. See also

Colorado Milling and Elevator Co. vs. Cunningham, 7 Fed. Sup. 965.

If the trust fund was not depleted during the period April 7 to June 15, 1932, in whole or in part, the bankrupt had the right to place other funds in the general bank account and withdraw them, as by so doing the city's lien was not in any degree impaired. It is conceded that on May 13, 1932, the trust fund was depleted to the extent of $13,069.42. So far as this record shows after the $44,982.46 was withdrawn from the general fund on June 15, 1932, there was left in the general bank account more than sufficient to satisfy any lien the city may have had on that date to the extent of $13,069.42. If so, the city cannot complain that other monies upon which it had no lien were either deposited in or withdrawn from the general bank account. Here again it is presumed that when the bankrupt withdrew this sum of $44,982.46, from its general bank account and deposited it in the trust fund bank account it withdrew only monies which it had a right to withdraw and on which the city had no lien. Empire State vs. Carroll, and Peoples National Bank vs. Moore, supra.

It is well settled that a claimant of a trust fund is entitled to recover from a receiver or trustee in bankruptcy only such an amount as the claimant can trace into a particular fund to the extent that that fund has passed into the hands of a receiver or trustee. While it is true that on May 13, 1932, there was in the general bank account, the fund into which the city had traced its money, $13,069.42, that fund had been reduced at the date of bankruptcy to $628.63, and there came into the hands of the trustee from that fund only the latter amount. There also came into his hands cash items consisting of cash in the till of $599.00 and a $1,000.00 debit ticket to be charged against the expense account. This city is not entitled to any claim or lien upon the cash in the till amounting to $599.00 or the $1,000.00 debit ticket which was to be charged against the expense account for the reason that it has not traced its funds into either of those items. If the testimony showed that either of these items had come from the general fund bank account which was the only fund into which the city traced its money, we would have a different question. Some support for a claim upon the cash in the till and the debit ticket cash item is found in the case of Schumacher vs. Harriett, 52 Fed. 2d, 817. In that case two checks were delivered by the claimant to a bank with directions to the officers of the bank to purchase bonds of the United States with a portion of the funds represented by the checks. The bank agreed to purchase the bonds and the claimant was given immediate credit

for the checks. The checks were forwarded by the bank for credit to two different correspondent banks. The balance to the credit of the forwarding bank in each of the correspondent banks was or several days after the receipt of the checks in an amount considerably in excess of the checks deposited. Gradually however, the balances were reduced until at the time of the failure of the forwarding bank in which the checks were originally deposited, the balance in each of the correspondent banks was exhausted. Among other things,
the court reached the conclusion that the checks were
59 received by the bank as cash and were treated by it
as such, and that they increased the cash and cash items in the tills of the bank at the time, and that when the failed bank placed the checks to its credit in the correspondent banks, it was dealing with them as its own and the presumption was that the cash which was left in its tills was intended to be subject to the trust. That while it had the right to collect the checks it had no right to place the proceeds to its credit in other banks without holding an equivalent amount in cash in its own vaults to satisfy the trust which it had assumed toward the claimant. We think this case is an unwarranted extension of the federal rule of tracing trust funds.

The same question was before the Circuit Court of Appeals of the 5th Circuit in the case of Pottorff vs. Key, 67 Fed. 2d, 833, and that court reached an opposite conclusion. Discussing the case of Schumacher vs. Harriett, supra, that court said;

"Schumacher vs. Harriett (C. C. A.) 52 Fed. (2d) 817, 82 A. L. R. 1, is much relied on to sustain the judgment appealed from. The court there reviews the cases and concedes that they establish such principles as we have just asserted, but avoids their consequences by the novel view that a trust check, when treated by a bank as one of its cash items, is thereby confused with its cash as though it had been unidentifiable currency; and that, if the bank misuses the check, it thereby sets apart as a trust res an equivalent value of other cash assets. Such a doctrine amounts to saying that in every case of misapplied money or money's equivalent the wrongdoer's other cash and cash items stand in its place so long as he has any, establishing in effect a general lien on all such. 'If the plaintiff's contention be well founded, and to follow misappropriated moneys it is only necessary to show that a receiver has, and that the trustee had, assets, the rule is simply that a demand for such moneys is a preferred claim against any substantial estate. To adopt this view is to do

away with all the equitable principles out of which the right to follow trust funds grew.' American Can Co. vs. Williams (C. C. A.) 178 Fed. 420, at page 423. We hold in this connection that, if a trust res can be followed, it must be; and that a lien by confusion can be fixed on a fund only when the confusion is actual and when the fund is shown to have really received and to still contain the trust res or its proceeds."

The Circuit Court of Appeals of the 5th Circuit again refused to follow the case of Schumacher vs. Harriett on this proposition, in Wisdom vs. Keen. 69 Fed. 2d, 349. We think the decisions of the Circuit Court of Appeals of the 5th Circuit should be followed. It follows that the most that can be allowed as a preferred and prior claim is the item of $628.63, the amount of money in the general fund bank account into which the city traced its money and which came into the hands of the trustee, and the balance of the city's claim should be allowed as a general claim.

The city is not entitled to satisfy its lien out of the securities deposited with the Department of Trade and Commerce as it is clearly not within Sec. 8-212 Compiled Statutes of Nebraska 1929, which is as follows:.

"Fund Deposited Liable for Trust Liabilities. The fund deposited as provided in section 9 (8-209), shall be primarily liable for obligations of such company as guardian, curator, executor administrator, assignee, receiver, trustee, either by appointment of court or under will, and for depository of money in court and shall not be liable for any other debt or obligation of the corporation until all trust liabilities aforesaid have been discharged. (1919 P. 722; C. S. 1922, 8074)." While most of the securities deposited with the Department of Trade and Commerce were deposited after the city's money was paid to the bankrupt, there is nothing to show when they were purchased. They may have been purchased long before the bankrupt received the city's money. In any event it will here again be presumed that the purchases were not made with the city's money. The city's money has not been traced into these securities.

We have discussed this matter as though the city was still the owner of the claim. It appears by stipulation, that the Standard Accident Insurance Co., executed to the city, a bond to protect it from the loss of this fund, and that the insurance company has paid to the city, the full amount of its claim, and the city has assigned to the company all its rights

against the bankrupt. In view of what has been heretofore said, it is unnecessary to determine whether or not a surety who has paid a claim upon which the state was entitled to priority of payment in virtue of its sovereignty is entitled to be subrogated to such sovereign right of priority upon payment of the claim to the sovereign. The following federal cases hold that it is. U. S. F. & G. Co. vs. Union Bank, 228 Fed. 448; American Bonding Co. vs. Reynolds, 203 Fed. 356. See also notes in 32 A. L. R. 846; 24 A. L. R. 1502; 83 A. L. R. 1131, 90 A. L. R. 207, from which notes it would appear that the weight of state authority is in favor of the rule subrogating the surety to the state's prerogative right of priority.

The order of the Referee is therefore modified to the extent of allowing the claim as a preferred claim in the sum of $628.63, and the balance of the claim in such an amount as the Referee shall find it to be, should be allowed as a general claim.

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61 Findings of Fact and Conclusions of Law.

Filed at 8:30 A. M., Dec. 17, 1934.

In the District Court of the United States, for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

No. 2314. In Bankruptcy.

In Re: Claim of the City of Lincoln.

This Cause came on to be heard before the court on the petition for review of an order of the referee disallowing the claim of the City of Lincoln, Nebraska, and Standard Accident Insurance Company, its assignee, for priority in the payment of its amended claim, and the parties appearing by their respective counsel, and the court being fully advised in the premises makes the following findings of fact and conclusions of law:

Findings of Fact.

1. On September 29, 1928, the City of Lincoln, in the State of Nebraska, a municipal corporation and an agency of the State of Nebraska, paid to the Lincoln Trust Company $45,000.00 which was to be held in trust for said city.

2. The money was placed by said trust company in its general bank account, thereby augmenting the general assets

of said trust company and was carried on the books of the trust company under the heading of "Trust Certificates".

3. On June 14, 1932, the city demanded repayment of said sum which was refused by the trust company and said trust company has paid no part thereof to said city.

4. Said trust company was adjudicated a bankrupt on July 9, 1932, and its assets then passed to the trustee in bankruptcy herein.

5. A claim was duly filed by said city against the bankrupt for said $45,000.00 and thereafter said claim was duly amended to include a claim of priority in payment and said city has, ever since said amendment was allowed,
62 claimed a priority in the payment of said $45,000.00 because it was a trust fund, entitling it to priority under the laws of the State of Nebraska, and because it was entitled to the priority of a sovereign under the laws of Nebraska.

6. The assets of the bankrupt which passed to the Trustee in Bankruptcy included $628.63 of the funds paid by said city to said trust company which amount was the lowest balance of cash in the bank account of said trust company prior to bankruptcy. There was also cash in the till of said trust company of $599.00 at the time of bankruptcy.

7. Subsequent to the hearing on the right of said city to priority the Standard Accident Insurance Company paid said city the amount of its amended claim and said amended claim was then duly assigned to said insurance company and said insurance company then became entitled to all the rights of said city under said amended claim.

Conclusions of Law.

1. Said City of Lincoln is now and has been since prior to September 29, 1928, a municipal corporation, and at the time of the assignment of said amended claim to the Standard Accident Insurance Company, was entitled to the payment of $628.63 of its amended claim prior to the payment of the claims of general creditors.

2. The sum of $45,000.00 paid by said city to the Lincoln Trust Company on September 29, 1928, was to be held in trust for said city and constituted a trust fund.

3. The Standard Accident Insurance Company, as assignee of said amended claim, became entitled to all of the rights of said city under said amended claim, including the right to payment of $628.63 of the amount of said amended claim prior to the payment of the claims of general creditors.

63 4. A judgment and decree should be entered herein ordering and directing the Referee to allow priority in the amount of $628.63 of said amended claim which sum shall be paid prior to the payment of claims of general creditors and the balance of said amended claim shall be allowed as a general claim.

5. The City of Lincoln and Standard Accident Insurance Company & Trustee are each allowed an exception.

Dated this 15th day of December, 1934.

J. A. DONOHOE,
District Judge.

O. K. as to form,
Don W. Stewart,
Atty. for Claimant.

R. A. Boehmer,
Atty. for Trustee.

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64 Judgment and Decree.

Filed at 8:30 A. M., Dec. 17, 1934.

In the District Court of the United States, For the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

No. 2314. In Bankruptcy.

In Re: Claim of the City of Lincoln.

This Cause came on to be heard before the court on the petition for review of an order of the referee disallowing the claim of the City of Lincoln, Nebraska, and the Standard Accident Insurance Company, its assignee, for a priority in the payment of its amended claim, and was argued by counsel, and the court having made findings of fact and conclusions of law in the premises, it is ordered, adjudged and decreed as follows, to-wit:

The order of the Referee disallowing priority in the payment of said amended claim is hereby modified to the extent of allowing priority in the amount of $628.63, said sum to be paid prior to the claims of general creditors and the balance of the claim is allowed as a general claim. To all of which

City of Lincoln and Standard Accident Insurance Company and Trustee each except and exceptions are hereby allowed.

Dated this 15th day of December, 1934.

J. A. DONOHOE,
District Judge.

O. K. as to form,
Don W. Stewart,
Atty. of Claimant.

R. A. Boehmer,
Atty. for Trustee.

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65 (Notice of Appeal by City of Lincoln, et al.)

(Filed in U. S. District Court at 12:05 P. M. Dec. 28, 1934.)

To L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, or R. A. Boehmer, his attorney of record:

You are hereby notified that the City of Lincoln, Nebraska and Standard Accident Insurance Company hereby appeal from the judgment and decree filed herein on December 17, 1934 by the District Court of the United States for the Lincoln Division of the District of Nebraska allowing a priority in the sum of $628.63 in the payment of the amended claim filed by said City of Lincoln, said appeal being taken to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated December 26th, 1934.

CITY OF LINCOLN, NEBRASKA
AND STANDARD ACCIDENT
INSURANCE COMPANY,
By Don W. Stewart,
A. A. Whitworth,
C. B. Paine,
Their Attorneys.

Service of the foregoing notice accepted December 26th, 1934.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt.
By R. A. Boehmer, His Attorney.

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66 (Petition of City of Lincoln, Nebraska, et al., for Appeal.)

(Filed in U. S. District Court at 12:05 P. M. Dec. 28, 1934.)

The City of Lincoln, Nebraska and Standard Accident Insurance Company, feeling aggrieved by the judgment and decree filed in the above entitled cause on December 17, 1934 do hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons set forth in the assignment of errors filed herewith, and said petitioners pray that their appeal be allowed and that citation be issued as provided by law, to L. A. Ricketts, Trustee in Bankruptcy of said Lincoln Trust Company, Bankrupt, and that a transcript of the record, proceedings and documents upon which said judgment and decree was based duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit under the rules of such court in such cases made and provided, and your petitioners further pray that the proper order be made providing the security to be required of them.

DON W. STEWART,
A. A. WHITWORTH,
C. B. PAINE,
Attorneys for Petitioners.

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67 (Assignment of Errors on Appeal of City of Lincoln, et al.)

(Filed in U. S. District Court at 12:05 P. M. Dec. 28, 1934.)

Come now the appellants in the above entitled cause and file the following assignment of errors upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree of this court filed herein on December 17, 1934.

1. The court erred in holding that the City of Lincoln's amended claim was not entitled to the priority accorded a sovereign at common law, which by Nebraska Statute is made a part of the Nebraska law.

2. The court erred in holding that the amended claim was not entitled to priority for the full amount as a trust fund under the laws of the State of Nebraska.

3. The court erred in holding that only $628.53 of the funds paid by the City of Lincoln to the bankrupt were traced into the hands of the Trustee in Bankruptcy.

4. The court erred in holding the amended claim was not entitled to payment from securities deposited with the Department of Trade and Commerce of the State of Nebraska.

5. The court erred in holding cash and cash items should not be included with cash in the bank account in determining the amount of the funds paid by the City of Lincoln to the bankrupt, which passed to the Trustee in Bankruptcy.

6. The court erred in holding the opinion of a Supreme Court Commissioner of the State of Nebraska should be considered as establishing the rule that the common law right of a sovereign to priority in payment of its claim is not a part of the law of Nebraska.

68 7. The court erred in sustaining the finding of the Referee that the common law right of a sovereign to priority in the payment of its claim is not a part of the law of Nebraska.

8. The court erred in sustaining the finding of the Referee that the amended claim was not entitled to priority for the full amount as a trust fund under the laws of the State of Nebraska.

9. The court erred in sustaining the finding of the Referee that the amended claim was not entitled to payment from securities deposited with the Department of Trade and Commerce of the State of Nebraska.

10. The court erred in holding that a municipal corporation is not within the provisions of subdivision 7 of Section 64-b as amended, of the Bankruptcy Act, U. S. C. A. Title 11, Section 104-b (7) allowing priority to "debts owing to any person who by the laws of the State and the United States is entitled to priority."

11. The court erred in refusing to direct the payment of the entire amended claim prior to the payment of claims of general creditors.

Wherefore, appellants pray that the judgment and decree filed herein on December 17, 1934 be modified by directing the payment in full of the amended claim of appellants prior to the payment of the claims of general creditors and for such

other and further relief as to the court may seem just and proper.

Dated December 26, 1934.

CITY OF LINCOLN, NEBRASKA
AND STANDARD ACCIDENT INSURANCE COMPANY, Appellants,
By Don W. Stewart,
A. A. Whitworth,
C. B. Paine.

69 United States of America,
State of Nebraska,
Lancaster County—ss.

Don W. Stewart, being first duly sworn upon his oath, deposes and says that he is attorney for the appellants; that appellants are each corporations and for that reason he makes this verification; that he has read over the foregoing assignments of error, knows the contents thereof and that the facts therein stated are true as he verily believes.

DON W. STEWART.

Subscribed and sworn to before me this 26th day of December, 1934.

CHARLES B. PAINE,
(Notarial Seal) Notary Public.

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70 (Waiver of Notice of Appeal by City of Lincoln, et al.)

(Filed in U. S. District Court at 12:05 P. M. Dec. 28, 1934.)

Receipt is hereby acknowledged of a copy of petition for appeal and assignment of errors to be filed in the above entitled court and relating to the decree filed in the District Court of United States for the District of Nebraska, Lincoln Division on December 17, 1934, and the undersigned hereby waives notice of hearing on said petition and consents to the immediate allowance of said petition for appeal.

Signed December 27th, 1934.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt,
By R. A. Boehmer,
His Attorney of Record.

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71 (Order Allowing Appeal to City of Lincoln, et al., by U. S. District Court.)

(Filed and Entered in U. S. District Court at 2:10 P. M. Dec. 29, 1934.)

This cause came on for hearing upon the petition of City of Lincoln and Standard Accident Insurance Company for an appeal from the judgment and decree entered in this cause by the District Court of the United States for the District of Nebraska, Lincoln Division, on December 17, 1934.

Upon due consideration whereof it is ordered said appeal is hereby allowed.

It is further ordered that petitioners file a bond in the sum of $500.00.

Signed this 29th day of December, 1934.

By the Court:

J. A. DONOHOE,
Judge.

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72 (Citation on Appeal of City of Lincoln, et al., and Acceptance of Service.)

(Filed in U. S. District Court, at 3 P. M., Dec. 31, 1934.)

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of Lincoln Trust Company, Bankrupt.

Case No. 2314

In Bankruptcy.

In Re Claim of City of Lincoln.

United States of America—ss.

To L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, forty days from and after the date of this citation pursuant to an appeal filed in the Clerk's office of the District Court of United States, District of Nebraska, Lincoln Division wherein City of Lincoln, Nebraska, and Standard Accident Insurance Company are appellants and you are appellee, to show cause, if any there be, why the judgment and decree filed herein on De-

cember 17, 1934, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Hon. James A. Donohoe, United States District Judge for the District of Nebraska, Lincoln, Nebraska, on December 29th, 1934.

J. A. DONOHOE,
District Judge.

Comes now L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, appellee and hereby accepts service of the citation on appeal in the above cause dated December 31st, 1934, and does hereby enter his appearance in the Circuit Court of Appeals of the Eighth Circuit.

L. A. RICKETTS,
Trustee in Bankruptcy of
Lincoln Trust Company,
Bankrupt,
By R. A. Boehmer,
His Attorney of Record.

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73 (Bond on Appeal of City of Lincoln, et al.)

(Filed in U. S. District Court Dec. 29, 1934.)

Know All Men By These Presents:

That the Standard Accident Insurance Company of Lincoln, Nebraska, and City of Lincoln, as principals, and Globe Indemnity Company, New York, N. Y., as surety, are held and firmly bound unto L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, in the sum of Five Hundred Dollars ($500.00) to be paid to said L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Dated this 29th day of December, 1934.

Whereas, a judgment and decree was rendered by the above entitled court in the above entitled proceedings on December 17, 1934, from which said principals have petitioned

for and have been allowed an appeal to the Circuit Court of Appeals for the Eighth Circuit.

Now, Therefore, the condition of the above obligation is that if said appellants shall prosecute their appeal to effect and without delay and answer all damages and costs if said decree be affirmed, then the above obligation to be void, otherwise to remain in full force and effect.

STANDARD ACCIDENT INSURANCE COMPANY, and
CITY OF LINCOLN, Principals,
By Don W. Stewart, Their Attorney.

GLOBE INDEMNITY COMPANY, Surety,
By C. E. Hinds, (Corporate Seal)
Attorney-in-fact.

The foregoing bond and surety thereon hereby approved.

J. A. DONOHOE,
District Judge.

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74 (Stipulation as to Appeals and as to Transcript of Record in Connection Therewith.)

Filed at 12:05 P. M. Dec. 28, 1934.

Whereas, the undersigned appellants intend to appeal from the judgment and decree filed in the above entitled matter on December 17, 1934, and intend to request the allowance of an appeal by the above entitled court and also by the Circuit Court of Appeals of the Eighth Circuit, and

Whereas, the appellee may desire to take a cross-appeal,

Now Therefore, it is hereby stipulated and agreed by and between the appellants and the appellee that the transcript of the record, proceedings and papers which may be transmitted by the Clerk of the above entitled court to the Circuit Court of Appeals of the Eighth Circuit pursuant to its order allowing said appeal, shall also be treated and considered as the transcript of the record proceedings and papers for the appeal allowed by the District Court of the United States for the District of Nebraska, Lincoln Division and for a cross-appeal if the appellee should desire to take a cross-appeal and said transcript of the record shall be considered as having been filed in each of the aforesaid appeal proceed-

ings, and both of said appeals shall be briefed, argued and treated as one appeal.

DON W. STEWART,
A. A. WHITWORTH,
C. B. PAINE,
Attorneys for Appellants.

R. A. BOEHMER,
Attorney for Appellee.

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75 Statement of the Evidence.

Filed at 2:10 P. M. Dec. 29, 1934.

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

Case No. 2314 In Bankruptcy.

In Re Claim of City of Lincoln.

On December 10, 1932, this cause came on for hearing before D. H. McClenahan, Referee in Bankruptcy, upon the claim of the City of Lincoln, Nebraska, to priority on its amended claim filed against the above named bankrupt and upon the objections of L. A. Ricketts, Trustee of said bankrupt to such priority and upon the City of Lincoln's reply to said answer. On February 21, 1934, Trustee's motion for leave to withdraw its submission and to file additional objections and adduce further evidence in support of such objections was sustained over the objections of the City of Lincoln and further evidence was thereupon received. At such hearings the aforesaid parties were each represented by counsel. Thereafter on September 7, 1934, this cause came on for hearing before the above entitled court upon the petition of said City of Lincoln and Standard Accident Insurance Company, assignee of said amended claim, to review the order of said Referee denying the right of priority in the payment of said amended claim. At such hearing the aforesaid parties were each represented by counsel. The following is a true and correct statement in narrative form of all of the evidence received in the hearings before said Referee and which evidence was thereafter received in the hearing before this court upon the petition for review of the aforesaid order of the Referee.

The following stipulation was offered by said City of Lincoln and was received in evidence at the hearing on December 10, 1932.

"It is hereby stipulated and agreed by and between L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, hereinafter referred to as bankrupt, and City of Lincoln, Nebraska, hereinafter referred to as claimant, that the following is a correct statement of facts and the truth of such facts is hereby admitted by the parties hereto and shall be accepted as true in connection with the amended claim of City of Lincoln, Nebraska, without further proof.

76 "1. Claimant is now and at all times hereinafter mentioned was a municipal corporation organized and existing under the laws of the State of Nebraska. E. M. Bair is now and at all times hereinafter mentioned was the city treasurer of said claimant.

2. Bankrupt at all times hereinafter mentioned up to July 9, 1932, was a corporation organized and existing under the laws of the State of Nebraska and engaged in conducting a general trust company business with its place of business in Lincoln, Nebraska.

3. On September 26, 1928, E. M. Bair as city treasurer of said claimant paid to bankrupt the sum of Forty-five Thousand Dollars ($45,000.00) which was funds of claimant. Said bankrupt thereupon executed and delivered to said claimant nine (9) certificates in the sum of Five Thousand Dollars ($5,000.00) each, payable on demand. The following is a copy of one of the said certificates, and the other eight certificates were the same, except as to their number:

"No. Lincoln, Nebraska, Sept. 26, 1928 No.....

This Is To Certify that the Lincoln Trust Company of Lincoln, Nebraska, holds for investment in Trust funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand & no/100 Dollars ($5,000.00) with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19....

This Trust Certificate bears no per cent interest after maturity.

LINCOLN TRUST COMPANY,
By (S.) Howard Hadley, Secretary."

Said $45,000.00 was placed by said bankrupt in its general fund and the following entry was made on a ledger sheet of said bankrupt:

Trust Certificate	City Treasurer of Lincoln	Credit	Balance
10-1-28	By 160-162 to 169 inclusive $5000.00 each at 3% on demand	45,000.00	45,000.00

4. Thereafter said bankrupt paid interest to said claimant at the rate of 3 per cent per annum up to March 26, 1932. There is due and owing from said bankrupt to claimant on said certificates the following:

77	Principal	$45,000.00
	Interest thereon at three per cent per annum from March 26, 1932 to June 15, 1932	302.45
	Interest thereon at the legal rate of seven per cent from June 15, 1932, to July 9, 1932, the date of filing the petition and of adjudication of bankruptcy of Lincoln Trust Company	206.55
	Total	$45,509.00

5. That no part of said debt has been paid; that there are no set-offs or counter-claims to the same; and that said claimant has not had or received any manner of security for said debt whatever.

6. Pursuant to the provisions of the statutes of Nebraska, the bankrupt deposited certain securities with the Department of Trade and Commerce of the State of Nebraska. The following is a description of the securities now held by said department, the par value thereof, and the date deposited with said department by bankrupt:

Description	Amount	Date Deposited
St. Louis & San Francisco R. R. Bond due 3-1-78	5000.00	9-14-28
Susquehanna Silk Co. Bond due 6-1-08	5000.00	5- 6-30
Tennessee Products Co. Bond due 1-1-36	5000.00	5- 6-30
Koenigstein Bond due 11-1-36	7000.00	11- 1-26
Westminister Presbyterian Church Bond due 3-1-39	10000.00	11-22-29
Mayer Bldg. Co., Bond due '39	2000.00	11- 4-31
Emery Bond due 8-12-38	3000.00	11-17-31
Perlinger Bond due 1-10-33	2000.00	11-19-31
Curtis Intersection Paving Bond due 11-1-34	2000.00	11-21-31
City of Lincoln District Paving Bond due 7-1-40	1000.00	11-17-31
Village of Wolbach Paving Bond due 11-1-34	5000.00	1-20-27
	$47000.00	

78 7. It is further stipulated that either or both parties reserve the right to object to any of the matters herein stipulated on the ground of competency or materiality, and it is further agreed and understood that either party may introduce further or other testimony or evidence as may be desired.

The foregoing stipulation signed this 10th day of December, 1932.

CITY OF LINCOLN, NEBRASKA,
By Max Kier &
Lloyd E. Chapman,
Its Attorneys.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company.
By R. A. Boehmer, His Attorney."

CHRIS O. SCHLYTERN called as a witness by said City of Lincoln testified he was at the time of his testimony employed by the Trustee of the bankrupt and had been since the Trustee's appointment. He was Assistant Trust Officer of the bankrupt from July 16, 1923 to January 15, 1931 and then Trust Officer from that date until it was adjudicated a bankrupt. He was in charge of its Trust Department and had general knowledge of all the books and records of the Company but more especially in the Trust Department. He knew how the payment by the City of Lincoln of certain funds to the Lincoln Trust Company in 1928 was handled in the books and records of the Company. It was posted on the ledgers and credited to "Trust Certificates" on the books on October 1, 1928 showing a credit of $45,000.00 under the heading of "City Treasurer, Lincoln Trust Certificates". A record was kept in the Trust Department separate from the general records of the Company at that time. The transaction was shown on the general records of the Company. It was not shown as a liability of the Trust Department. There was a separate record of the liabilities of the Trust Department at that time. There was no separate bank account for the Trust Department at that time but one was established on
79 October 3, 1931. At that time the trust liabilities of the Trust Department were uninvested balances, cash on hand in the Trust Company's administrator, executor accounts, guardian accounts and trustee accounts, of approximately $49,679.17, which is the amount that was put in the Trust Department bank account. The $45,000.00 paid by the

City of Lincoln was carried on the Trust Company's books listed "Trust Certificates" but the cash was in the general bank account. The $45,000.00 paid by the City was never carried on the books of the Trust Department. It was carried on the general ledgers of the Trust Company labelled "Trust Certificates". He produces a book of the Trust Company called "Daily Statement Record" which is a summary or total of the items that are described in it. On the 13th or 14th line, the items "Trust certificates $64,025.64" appears, which includes the City's $45,000.00. The City's $45,000.00 was carried under that heading and in that account from the time it was paid to the Trust Company until the closing of the Trust Company. The items above it are ten or twelve Trust Department items such as "cash", P. C's, and trust funds undisbursed and trust funds."

In October of 1931, a separate bank account was opened for trust funds. Prior to that time all funds held by the Trust Company were kept in its general bank account. The $45,000.00 paid by the City was not transferred at that time to the Trust Department bank account because the Trust Company "did not have funds enough,—segregated." The $45,000.00 paid by the City in September 1928 was deposited in the general bank account of the Trust Company.

Q. What was the lowest balance in the bank account of the Trust Company thereafter up to June 15, 1932?

Mr. Boehmer: Object as calling for a conclusion of the witness, incompetent, irrelevant and immaterial, not binding on the trustee.

Mr. Stewart: Do you object to the competency of the witness?

Mr. Boehmer: No.

80 Q. Have you examined the records on that, Mr. Schlytern and do you have the records here in the court room? A. Yes, sir.

Q. Will you state from the records what is or was the lowest balance after that money was paid by the City up to June 15, 1932?

Mr. Boehmer: The trustee objects as calling for a conclusion of the witness, incompetent, irrelevant and immaterial, not binding on the trustee.

Overruled.

Exception.

A. That was up to June 15, 1932?
Q. That is right.
A. About May 13, 1932.
Q. What was the amount?
A. Actual cash on hand (probably intended for 'on deposit' instead of 'on hand') $7,875.97. In addition to that there was a debit balance due from the Lincoln Safe Deposit; of course that could not be considered cash.

The lowest balance after the Trust Company received the City's money up to June 15, 1932 of cash items including cash on hand was $5,193.45 on May 13, 1932 and cash on deposit $7875.97 on May 13, 1932. The majority of the cash items were "debits carried forward from day to day and not charged into the expense accounts, or some advancement to employees that were out on the road until they got their checks." They were items that actually represented cash to the Company.

On June 15, 1932 an account was set up on the Trust Department books designated as "segregated assets", which totalled approximately $44,982.46, which was funds taken from the general account of the Trust Company and transferred to the Trust Department of the Trust Company. This fund was to cover items of principal payments, interest and other payments that were received after April 7, 1932 when Mr. Richardson was made President. No special items of liability were set up against that fund when it was transferred to the Trust Department. Later on as disbursements were
81 made from that account such disbursements were charged as liabilities against the account. The funds taken from the general account of the Trust Company as aforesaid were deposited in the Trust Department bank account. The lowest balance in the Segregated Assets account from the time it was created until the Trust Company closed was $25,097.09 and was on the day it closed. This balance of $25,097.09 was turned over to the Receiver in Bankruptcy and then by the Receiver to the Trustee in Bankruptcy.

The lowest balance of cash and cash items and cash on deposit in banks in the general account of the Trust Company after June 14, 1932 was on July 8, 1932, which was cash in bank $628.63, cash items $1,599.00 which include $599.00 cash. This cash, cash items and cash on deposit passed to the Receiver in Bankruptcy and later to the Trustee in Bankruptcy of the Trust Company. In keeping records in the Trust Department it set up accounts of all liabilities in that department and at the time the Trust Company closed it had in its Trust Department exclusive of the Segregated Assets account, sufficient funds to take care of all of these liabilities,

but not including the City's claim. The City made a demand on the Trust Company for payment of the $45,000.00 to it on or about June 14, 1932. The Trust Company acted as executor and administrator of assets and as guardian but not as curator. It was not acting as assignee at the time it closed. It was acting as Receiver but did not have any liability as Receiver. It was also acting as Trustee by appointment of court and under wills at the time it was closed. Its liabilities as such Trustee were carried in the accounts of the Trust Department. It was not acting as depository of money in court at the time it was closed.

Cross-Examination.

At the time the City deposited this money with the Trust Company and thereafter there were other funds deposited and a like certificate issued. The highest balance in that account was $64,025.64 on August 9, 1930, which included
82 the City's money. The whole account was carried in the same manner in the general funds of the Trust Company and no part of it at any time was set over into the Trust Department. The funds in that account were never transferred to the bank account of the Trust Department. At the time the bank account was set up for the Trust Department the items that were transferred from the general account to the Trust Department account included only uninvested balances in administrator and executor accounts, guardian accounts, voluntary and testamentary trusts. An amount of money that would equal the balances that were due those estates was taken out of the general account of the Trust Company and deposited in a separate account entitled "Trust Department Account." That account did not include the money deposited by the City of Lincoln or others for which trust certificates were issued. They were never transferred and placed in the Trust Department account.

Exhibit 2 is a form of receipt that the Trust Company issued to a certain class of investors. Persons depositing money in the Trust Company were issued receipts in the form of Exhibit 2 entitled "Modern Investments" but the names, dates and amounts were filled in.

Mr. Boehmer: We offer in evidence Exhibit 2.

Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial.

Overruled.

Exception.

Exhibit 2 is as follows:

(Exhibit 2.)

"Class..... $.....

Lincoln Trust Company

Modern Investments

Lincoln, Nebraska, ... 192.....

I, ... of Lancaster County, Nebraska, hereby agree to purchase from Lincoln Trust Company, Modern Investment bonds in the sum of ..... to be paid in monthly payments of $..... each.

The conditions of this contract of sale are as follows: Lincoln Trust Company agrees to pay interest at the rate of 6% per annum on each payment, from the date thereof, until the investment bond has been selected by and delivered to me. It is understood that I may select at the market price on day of delivery any Government, industrial, railroad, municipal, or farm or city real estate loan bond which Lincoln Trust Company has on hand at the time. It is understood
83 and agreed that unless this contract is completed within one year from the date hereof, because of any delay caused by me, then and in that case interest on the several payments made shall be calculated at 5½% instead of 6%. And it is further understood and agreed that in the event of great need on my part, I may have this agreement cancelled, and Lincoln Trust Company agrees to repay the principal of my several payments theretofore made together with interest at the rate of 4% from the date of each to the date of cancellation.

Payments on this contract shall be made on the 15th of each month until completed.

.....
As purchaser of Investment Bonds.

Accepted:

.....
For Lincoln Trust Company."

The largest amount of Modern Investment accounts in the general fund of the Trust Company after September 26, 1928 up to the adjudication in bankruptcy was on September 25, 1928, $114,418.00. The amount of that account after September 26, 1928 was less than that amount. The fluctuation be-

tween September 26, 1928 and October 1, 1928 was only $600.00. The lowest amount in this account prior to bankruptcy was $28,592.05 on June 28, 1932. After that date no more money was paid out on those accounts. There were approximately three hundred such accounts at the highest peak. The money in the Modern Investment accounts was in the general fund and was never transferred to the Trust Department account nor was it ever carried in the Trust Department bank account.

Exhibit 3 is a blank form of agreement called "Eltelic Contract" that was entered into by the Trust Company with a certain class of depositors.

Mr. Boehmer: The objectors offer in evidence Exhibit No. 3.

Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial.

Overruled.

Exception.

Exhibit 3 is as follows:

84 (Exhibit 3.)

Eltelic Contract
with
Lincoln Trust Company

Memorandum of Agreement:

Entered into this ..... day of ....., 193.... between Lincoln Trust Company, a Nebraska Corporation of Lincoln, Nebraska, as party of the first part, and .... of ..... as party of the second part:

Witnesseth, that whereas said party of the second part is now carrying life insurance upon ..... life, as follows:

And, whereas said ..... policies, as above set out, aggregate ..... Dollars of Insurance, and the combined annual premiums are the sum of ..... Dollars.

Now, therefore, in consideration of the payment by said second party of the sum of ..... Dollars, receipt whereof is hereby acknowledged, and in further consideration of the covenants and payments hereinafter set out, the said Lincoln Trust Company, first party, hereby covenants and agrees, as follows:

1. To open on the books of said Trust Company an account in the name of said second party; to credit to said account the amount herein acknowledged as received from second party and all subsequent payments to be made by second party as hereinafter set out; and annually on the ..... day of ..... in each year hereafter during the life of this contract to credit to said account interest at the rate of ..... per cent on the daily balances to the credit of second party.

2. To pay upon the receipt of premium notices unto each of the Insurance Companies hereinbefore named, at their respective offices or to their duly appointed agents qualified to receive the same, the said premiums as heretofore set out, during the life of this contract, promptly as the same respectively shall fall due and to give instructions to the said Insurance Companies that receipts for the payments so made are to be sent to the insured.

3. To send upon written request statement to second party showing the amount of payment due and to also state the amount of credit balance belonging to second party.

In Consideration of the covenants and agreements of said first party, the Lincoln Trust Company, said second party, agrees:

1. To pay to the first party at its office at Lincoln, Nebraska, in good exchange or lawful money of the United States during the life of this contract and the life of said policies of insurance, the sum of ..... Dollars on the ..... day of each month thereafter, beginning in the month of ..... 193..... and thereafter on the ..... day of each month, the sum of ..... Dollars.

2. To turn over all premium notices or interest notices received by second party to the first party immediately upon their receipt by second party.

3. To give written notice to the first party whenever any policies are to be added to those enumerated in this agreement or whenever any policies are to be dropped from this contract, and immediately upon the addition of any policy to increase the monthly payments above agreed by the 1/12 the amount of the premium of any such added policy.

85 4. That an average credit balance of not less than $50.00 shall always be in the hands of first party over and above any premiums which first party may be obliged to pay for and on behalf of second party under the terms of this

contract and second party further agrees that in case his average credit balance shall at any time be less than $50.00 that he will pay to first party the sum of fifty cents per month as a service charge in connection with this contract.

It is hereby mutually agreed by and between the parties hereto that if the second party shall fail and neglect to make the payments hereinbefore set out at any time during the life of this contract, not having exercised the option hereinafter mentioned, then, in such event, first party shall have one of two options:

(a). If the balance to the credit of second party on the books of first party is sufficient to pay the next annual premium falling due, first party may pay such premium to the Insurance Company entitled to receive it, and charge the amount to the account of the second party notwithstanding his laches; or

(b). First party may, without paying such premium calculate interest up to the date current, close the account by mailing check or draft for the balance, if any, to the second party at ..... last known post-office address, declare the contract cancelled and be acquitted and released from further liability hereunder.

It is further hereby mutually agreed by and between the parties hereto that whenever the interest accumulation or gain, if any, through dividends from participating policies, over payments, or other gain or credit, to the credit of second party on the books of first party, shall equal or exceed the sum of more monthly payments to be made by second party to first party, in such event, second party shall have the option to have such balance of interest or over payments or dividend accumulation or other gain, applied to the payment of further premiums in lieu of the one or more monthly payments such balance equals or exceeds; but second party shall give notice of ..... desire to exercise such option, in writing, to first party, stating the particular monthly payment or payments to be substituted by such balance.

It is further mutually agreed by and between the parties hereto that in the event of the death of second party at any time during the life of this contract, first party shall pay over to the executor or administrator or the estate of second party any balance found due to second party on the books of first party, and this contract shall cease and be at an end.

It is further mutually agreed by and between the parties hereto that either party shall have the option to terminate

this agreement by giving the other party written notice of ..... or its intention so to do, and first party shall calculate interest as aforesaid to the date of such proposed termination, pay over to second party the balance, if any, found due, by mailing check or draft for such amount, if any, to the last known postoffice address of second party and this contract shall cease and terminate and both parties shall be released and acquitted from any further liability hereunder.

In testimony whereof the parties hereto have set their hands as of the day and year first above written.

LINCOLN TRUST COMPANY,
By.....
First Party.

.....
Second Party.

Witnesses
.....
.....

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86 On September 26, 1928, there was approximately $36,516.76 in such accounts, which was the "peak". There was still some money in that account at the date of the adjudication in bankruptcy. The lowest amount in that account due the investors was $18,910.25 on June 28, 1932. In both the Eltelic and Modern Investment accounts the amount fluctuated from month to month. Some made deposits and others withdrew. The Eltelic account was kept in the general bank account and was never transferred to the Trust Department account.

The Trust Company also had "so-called investment accounts" which were receipts issued for money left there by individuals to be invested in the purchase of securities. The highest balance in this account was $95,484.32 on August 24, 1931. That account fluctuated from day to day and from month to month. The lowest amount in that account was $65,048.91 on June 28, 1932. Some money was paid out after that date up to July 8th and nothing was put in but he does not have the balance. The money in this account was kept in the general funds of the Trust Company and was never transferred to the Trust Department account. The general account was the one in which the Trust Compay kept all their own money and the other accounts testified to and out of this account the Trust Company paid its expenses, cost of operation of business and "any other items that came up".

Q. Now were there any other items of principal or interest that was paid into that account by borrowers of money or mortgagors? A. Yes, sir.

Q. Who were paying to the Lincoln Trust Company as trustee for bondholders and investors?

Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial, no proper and sufficient foundation laid, calling for a conclusion of the witness.

Overruled.

Exception.

A. It was.
Q. Isn't it a fact that was the account of all those moneys that were paid and deposited, that is money paid by borrowers on principal and also on interest?
87 A. Yes, sir.

Other items of money that would be deposited in the general account were rentals and insurance premiums, payments on collateral notes, commission notes and safety deposit box rentals. The moneys and profits due the Trust Company were put in that account and were co-mingled with the amount paid in to be applied on principal and interest due to investors and with the money deposited under the Modern Investment accounts, Eltelic accounts, investment accounts and with the money paid in by the City of Lincoln and with the funds belonging to the Trust Company itself. These funds were in no way related to the funds segregated or deposited in the Trust Department account. The funds segregated and placed in the Trust Department account on June 15, 1932 was $44,982.46.

Q. And do you know what the purpose of that segregation was? A. Yes, sir.
Q. You may state?

Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial, no proper and sufficient foundation laid.

Overruled.

Exception.

A. I cannot itemize, just generally, principal of the amount, was to take care of all payments on loans both principal and income, and Eltelic payments that came in after Mr. Richardson was made president.

Between April 7th and June 15, 1932, certain persons owing money to the Lincoln Trust Company as borrowers or mortgagors paid in certain amounts to be applied on the principal and interest of their indebtedness and others paid in money on Eltelic accounts to be paid as insurance premiums.

Q. And the amount of those payments were kept track of and the amounts that were paid, they were kept track of were they, and the amounts loaned to the trust company, is that correct?

Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial.

Overruled.

Exception.

A. They were.

88 Q. Then on the 15th day of June, 1932, a sum of money equal to the payments made on principal and interest by the borrowers and the amounts paid on these Eltelic contracts subsequent to April 7th, and prior to June 15 was segregated and placed in the trust department, is that correct?

Mr. Stewart: Object as no proper or sufficient foundation laid, incompetent, irrelevant and immaterial.

Overruled.

Exception.

A. That is right.

Q. And was any amount included in that sum to cover the amount of the deposit made by the City of Lincoln?

A. No, sir.

Q. Do you have your books here showing the matters that you have just testified to, to any extent?

A. I have the account showing the original at the time when it was set up on our books, and the payments made since that date up to the date of bankruptcy.

Q. And the payments were made out of that account after the 15th of June, 1932, and the date of the bankruptcy, were they?

A. Yes, sir.

Q. And they were paid out for the specific purposes for which that account was set aside, is that right?

A. Yes, sir.

Nothing was paid out of that account to any persons on the Modern Investments or other general investments made by

people to buy securities. That money was put in the Trust Department account and after the adjudication in bankruptcy the balance in the segregated account was paid to the Receiver but it is still in the Trust Department.

The cash items on July 8, 1932 included currency in the cashier's cage "and the checks and debit tickets were not run in the day's business". In the cash items was a debit ticket of $1,000.00 to be charged to the expense account.

Q. And that was not in fact cash, and there is nothing to show it was ever collected afterwards as cash?

89 Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial.

Overruled.

Exception.

A. No, sir.

The actual cash in the bank on July 8, 1932 was $628.63 and that is the amount that was turned over to the Receiver at the time of the adjudication in bankruptcy. On that date the funds in the Trust Department account was $42,443.91.

The general account of the Trust Company fluctuated from day to day as deposits were made and amounts withdrawn from prior to the time the City deposited its money up to the date of bankruptcy. The daily deposits around October 30, 1928 varied from $5000.00 to $50,000.00.

Redirect Examination.

The balance in the Trust Certificate account was $64,000.00 on August 9, 1930. It then went down to $51,000.00 about August, 1930, and then went down to $46,000.00 on January 30, 1931. It then dropped off slightly until at the time the Trust Company closed it was $45,125.65.

The Eltelic and Modern Investment liabilities of the Trust Company were carried on its books in its general account. The Investment account was $95,000.00 on August 24, 1931, which was the highest amount. An ordinary form of receipt was issued by the Trust Company to the persons paying in money to the Trust Company for its Investment account. The person paying in the money would receive a receipt in substance:

"Received of John Jones, One Hundred ($100.00) Dollars.

(Signed) LINCOLN TRUST COMPANY."

After the segregated assets account was set up, money was received and credited to that account. Interest and principal payments received by the Trust Company were credited to that account and then paid out through that account. He did not have any record at the hearing showing the amount of principal and interest paid in between April 7th and June 15, 1932, only the total figure already given. A person might have paid interest to the Trust Company
90 on April 8, 1932 and the Trust Company had not disbursed it to the interest coupon holder but paid it into its general account. Then sometime later, the Trust Company took out some money from the general account to take care of items of that character. As interest payments and principal payments came in they were placed in the Segregated Assets account and then disbursed from that account up to June 1st, when a Trust Company general account was opened with the Continental National Bank and the coupon payments were deposited there.

Q. That money that was put up in the segregated assets account was intended to cover any liabilities of a trust nature, wasn't it?

Mr. Boehmer: The Trustee objects as cross-examination of his own witness, no foundation laid, calling for a conclusion of the witness.

Q. Is that true, Mr. Schlytern?
A. Yes, sir.

Recross Examination.

Q. When you say that that was put up to pay trust accounts you don't mean it was put in to pay any liabilities of the trust department to the Trust Company?
A. No, sir.
Q. Will you state what you mean?
A. As trustee for bondholders.

The coupon payments received June 1st and 15th were deposited with the Continental National Bank and the customers were sent to the bank to collect the coupon payments. Nothing was taken from the segregated assets account and deposited with the Continental National Bank.

91 Redirect Examination.

The money put in the segregated assets account was not intended to cover liability for money paid in by Modern Investment investors. It was intended to cover Eltelic payments.

No further evidence was introduced by any of the parties at said hearing.

On February 21, 1934, the following stipulation was offered and received in evidence.

(Stipulation of Facts.)

"It is hereby stipulated and agreed by and between L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, City of Lincoln, Nebraska and Standard Accident Insurance Company, that the following is a correct statement of facts and the truth of such facts is hereby admitted by the parties hereto and shall be accepted as true in connection with the amended claim of City of Lincoln, Nebraska and its motion to reconsider and set aside the allowance of said claim as a general claim and to allow such claim as a prior claim.

1. On September 26, 1928 Lincoln Trust Company as principal and said Insurance Company as surety executed and delivered to said City a bond wherein it was agreed the sum of Forty-Five Thousand and no/100 ($45,000.00) Dollars then paid by said City to said Trust Company should be repaid to said City upon its demand. On or about June 15, 1932, said City demanded the repayment of said sum from said Trust Company, which said Trust Company failed to repay. Said City of Lincoln is a municipal corporation of the State of Nebraska, governed under a home rule charter.

2. On December 12, 1932, said City and said Insurance Company entered into an agreement whereby said Insurance Company agreed to pay and did pay said City the sum of $45,276.81 in satisfaction of its liability on the aforesaid bond and said City in consideration thereof agreed to assign to said Insurance Company the certificates in the amount of $45,000.00 delivered by said Trust Company to said City when the aforesaid payment was made by said City to said Trust Company and said City further agreed to and did assign to said Insurance Company all its rights arising out of the payment of said $45,000.00 to it by said Trust Company, a bankrupt, in the sum of $45,000.00 with interest. L. A. Ricketts, Trustee in Bankruptcy of said Trust Company had knowledge of the foregoing settlement on December 12, 1932.

3. In the event only that the foregoing facts are received in evidence by the Referee, it is further stipulated and agreed that by reason of the facts heretofore set forth in this stipulation, said Insurance Company is the assignee of the claim and amended claim of said City of Lincoln against the above named bankrupt in the sum of $45,000.00 and said City of

Lincoln assigned all of its rights against said bankrupt to said Insurance Company, and said Insurance Company should be made a party to the proceedings relating to the allowance of said amended claim, and the parties hereto consent that an order be entered by the Referee designating said Insurance Company as assignee of said claim and amended claim and making it a party to the foregoing proceedings.

4. It is further stipulated and agreed that all of the parties hereto reserve the right to object to any of the matters of fact herein stipulated on the ground of immateriality thereof."

(Approval of Statement of Evidence by Counsel.)

The above and foregoing is all the evidence introduced at the aforesaid hearings before the Referee and at the
92 aforesaid hearing before this court.

Wherefore, appellants pray that the above statement of evidence be settled, approved and allowed by the above entitled court as a true and correct statement of all of the evidence received at the aforesaid hearings, for use on the appeal taken to the Circuit Court of Appeals for the Eighth Circuit.

Dated December 26, 1934.

DON W. STEWART,
A. A. WHITWORTH,
C. B. PAINE,
Attorneys for Appellants.

Approval of Statement of Evidence by Appellee and Waiver.

The foregoing statement is agreed to as a correct statement under paragraph b of Equity Rule 75 and the lodgment thereof in the Clerk's office for the examination of the appellee and notice of such lodgment and of the time when same will be presented to the Judge for approval, are hereby waived and the same may be approved by the Judge at once.

Dated December 26, 1934.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt,
By R. A. Boehmer,
His Attorney.

Approval of Statement of Evidence by Judge.

On this 29th day of December, 1934, the foregoing statement having been presented to me, the same is hereby [and] all things allowed and approved and the same is hereby ordered filed as a "Statement of the Evidence" to be included in the record of appeal in the above styled and numbered cause as provided in Paragraph b of Equity Rule 75.

J. A. DONOHOE,
District Judge.

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93 (Additional Transcript on Cross-Appeal of L. A. Ricketts, Trustee.)

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

In Re Claim of City of Lincoln.

No. 2314. In Bankruptcy.

Pleas before Honorable J. A. Donohoe, Judge of the District Court of the United States, in and for the District of Nebraska, within the Eighth Judicial Circuit, at the October 1934 Term of said Lincoln Division, begun on the 4th day of October, 1934, and held, for the Court's convenience, at the United States Court House in the City of Omaha within the Omaha Division of the District of Nebraska.

Appearances.

For Appellant:

R. A. Boehmer, 126 South 11th Street, Lincoln Nebraska.
Perry W. Morton, 126 South 11th Street, Lincoln, Nebraska.

For Appellee:

Stewart, Stewart and Whitworth, 1412 Sharp Building, Lincoln Nebraska.

Be It Remembered, That at a District Court of the United States for the District of Nebraska, Lincoln Division, held at the United States Court House in the City of Omaha, in the Omaha Division, for the convenience of the Court, at the October 1934 Term, there being present and presiding Honorable J. A. Donohoe, United States District Judge in and for the District of Nebraska, proceedings were had and done in the respective days hereinafter mentioned in the matter of

Claim of the City of Lincoln against L. A. Ricketts as Trustee of the Lincoln Trust Company, Bankrupt, that is to say:

94 Praecipe for Additional Transcript.

Filed at 10:15 A. M. Jan. 7, 1935.

To R. C. Hoyt, Clerk of said Court:

In preparing the transcript of the record on the appeal of the City of Lincoln, Nebraska and Standard Accident Insurance Company please incorporate therein the following additional portions of the record:

1. Petition for cross-appeal.

2. Assignment of errors on cross-appeal.

3. Order allowing cross-appeal.

4. Citation dated January 3, 1935 and admission of service.

5. Petition for cross-appeal to Circuit Court of Appeals, Eighth Circuit.

6. Assignment of errors on cross-appeal, filed in Circuit Court of Appeals, Eighth Circuit.

7. Waiver of notice of hearing on petition for cross-appeal to Circuit Court of Appeals, Eighth Circuit.

8. Order of Circuit Court of Appeals, Eighth Circuit, allowing cross-appeal.

9. Citation of Circuit Court of Appeals, Eighth Circuit, on cross-appeal and admission of service thereof.

10. This praecipe and admission of service thereon.

Signed this 7th day of January, 1935.

R. A. BOEHMER,
PERRY W. MORTON,
Attorneys for L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company.

We hereby acknowledge receipt of a copy of the foregoing praecipe, and accept service of the same this 7th day of January, 1935, and propose no additions thereto.

CITY OF LINCOLN and
STANDARD ACCIDENT INSURANCE COMPANY,
By Don W. Stewart,
A. A. Whitworth,
Charles B. Paine.

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95 (Petition of L. A. Ricketts, Trustee in Bankruptcy, etc., for Appeal.)

(Filed in U. S. District Court at 8:30 A. M. Jan. 3, 1935.)

To the Honorable J. A. Donohoe, Judge of said court:

Your petitioner, L. A. Ricketts, Trustee in Bankruptcy of the Lincoln Trust Company, who is the objector in the above entitled cause, respectfully shows that City of Lincoln, Nebraska and Standard Accident Insurance Company, its assignee, have been allowed an appeal from the judgment and decree made on the 17th day of December, 1934, in this cause, and your petitioner, the objecting trustee, also considered himself aggrieved by said judgment and decree, insofar as it allows priority in the payment of the claim of said City of Lincoln, Nebraska, and Standard Accident Insurance Company, its assignee, in the amount of $628.63, and therefore petitioner prays for the allowance of a cross appeal from said judgment and decree to the Circuit Court of Appeals of the United States, Eighth Circuit, for the reasons stated in the assignment of errors filed herewith.

Dated January 2, 1935.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company.
By R. A. Boehmer &
Perry W. Morton,
His Attorneys.

Cross-appeal allowed this 3rd day of January, 1935.

J. A. DONOHOE,
District Judge.

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96 (Assignment of Errors on Appeal of L. A. Ricketts, Trustee in Bankruptcy, etc.)

(Filed in U. S. District Court at 8:30 A. M. Jan. 3, 1935.)

Comes now L. A. Ricketts, Trustee in Bankruptcy, appellee in the above entitled cause, and files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree and judgment filed on December 17, 1934 in the District Court of the United States for the District of Nebraska, Lincoln Division:

1. The court erred in finding and holding that the claimant has, ever since the amendment to its claim was allowed, claimed that it was entitled to priority of a sovereign under the laws of Nebraska.

2. The court erred in finding and holding that the assets of the bankrupt which passed to the Trustee in Bankruptcy included $628.63 of the funds paid by said city to the Bankrupt.

3. The court erred in finding and holding that the Standard Accident Insurance Company became entitled to all the rights of said city under said amended claim.

4. The court erred in finding and holding that the sum of $45,000 paid by said city to the Lincoln Trust Company was to be held in trust for said city, and that it constituted a trust fund.

5. The court erred in modifying the order of the Referee and in allowing priority in the amount of $628.63 and in ordering said sum to be paid to said claimant prior to the claims of general creditors.

6. The court erred in not finding and holding that the funds deposited with said bankrupt did not constitute a trust fund.

97 7. The court erred in not finding and holding that the said claimant was not entitled to any priority over other creditors.

Wherefore, appellee and cross-appellant prays that the judgment and decree filed in the District Court of the United States for the District of Nebraska, Lincoln Division, on December 17, 1934, be modified by denying any priority to the claim of said City of Lincoln and Standard Accident Insurance Company in any sum whatsoever, and that said claim be

allowed as a general claim only, and for such other and further relief as to the court may seem just and proper.

Dated Jan. 2, 1935.

L. A. RICKETTS,
Trustee of Lincoln Trust Company, Bankrupt.
By R. A. Boehmer &
Perry W. Morton,
His Attorneys.

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98 (Citation on Appeal of L. A. Ricketts, Trustee in Bankruptcy, etc. and Acknowledgment of Service.)

(Filed in U. S. District Court at 10:15 A. M., Jan. 7, 1935.)

In the District Court of the United States, District of Nebraska, Lincoln Division.

In the Matter of
Lincoln Trust Company, Bankrupt.

Case #2314 In Bankruptcy.

In Re Claim of the City of Lincoln.

To City of Lincoln, Nebraska and Standard Accident Insurance Company and to Don W. Stewart, A. A. Whitworth, and C. B. Paine, their attorneys:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the city of St. Louis, Missouri forty (40) days from and after the day this citation bears date, pursuant to a cross-appeal filed in the Clerk's office of the District Court of the United States for the District of Nebraska, Lincoln Division wherein L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, is appellee and cross-appellant, and City of Lincoln, Nebraska and Standard Accident Insurance Company are appellants and cross-appellees, to show cause, if any there be, why the order entered on December 17, 1934, in the respects mentioned in said cross-appeal should not be reversed, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Judges of the District Court of the United States for the District of Nebraska this 3rd day of January, 1935.

J. A. DONOHOE,
United States District Judge.

Service of the foregoing citation on cross-appeal acknowledged and accepted this 5th day of January, 1935.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Attorneys for Standard Accident Insurance Company and City of Lincoln.

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99 (Clerk's Certificate to Transcript.)

United States of America,
District of Nebraska,
Lincoln Division—ss:

I, R. C. Hoyt, Clerk of the District Court of the United States in and for the District of Nebraska, hereby certify that pursuant to orders allowing appeal and cross appeal, and in compliance with praecipe for Transcript on Appeal, a copy of which is found on page 3 hereof, and with praecipe for Transcript on Cross-Appeal, a copy of which is found on page 94 hereof; the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings on file and of record in said court, as indicated in the foregoing index, in the matter of the claim of The City of Lincoln, and of the Standard Accident Insurance Company against L. A. Ricketts as Trustee of the Lincoln Trust Company, Bankrupt, No. 2314 In Bankruptcy.

I further certify that copies of the Citation on Appeal and of the Citation on Cross-Appeal, duly certified, have been lodged and remain in my office as such clerk.

Seal
U. S. Dist. Court
Dist. of Nebraska
Lincoln Div.

Witness my hand and the Seal of Said Court at Lincoln, in said District this 8" day of January, 1935.

R. C. HOYT, Clerk,
By E. B. Panter,
Deputy Clerk.

Filed Jan. 10, 1935, E. E. Koch, Clerk.

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100 (Petition of City of Lincoln, et al., for Appeal Filed in U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals
Eighth Circuit.

In the Matter of
Lincoln Trust Company, Bankrupt.

Case No. 2314. In Bankruptcy.

In Re Claim of City of Lincoln.

To the Honorable the Judges of the Circuit Court of Appeals for the Eighth Circuit for the United States:

Your petitioners, City of Lincoln, Nebraska, and Standard Accident Insurance Company respectfully represent:

1. On September 29, 1928, the City of Lincoln, in the State of Nebraska, a municipal corporation and an agency of the State of Nebraska, paid to the Lincoln Trust Company $45,000.00 which was to be held in trust for said city. The money was placed by said trust company in its general bank account, thereby augmenting the general assets of said trust company and was carried on the books of the trust company under the heading of "Trust Certificates". On June 14, 1932, the city demanded repayment of said sum which was refused by the trust company and said trust company has paid no part thereof to said city.

2. Said trust company was adjudicated a bankrupt on July 9, 1932, and its assets then passed to the trustee in bankruptcy herein. A claim was duly filed by said city against the bankrupt for said $45,000.00 and thereafter said claim was duly amended to include a claim of priority in payment and said city has, ever since said amendment was allowed, claimed a priority in the payment of said $45,000.00 because it was a trust fund; entitling it to priority under the laws of the State of Nebraska, and because it was entitled to the priority of a sovereign under the laws of Nebraska. Subsequent to the hearing on the right of said city to priority the Standard Accident Insurance Company paid said city the amount of its amended claim and said
101 amended claim was then duly assigned to said insurance company and said insurance company then became entitled to all the rights of said city under said amended claim.

3. All of the foregoing facts were so found by Honorable J. A. Donohoe, Judge of the District Court of the

United States for the District of Nebraska, Lincoln Division, upon a hearing before him on the petition of your petitioners for a review of an order of D. H. McClenahan, Referee in Bankruptcy, disallowing the claim of your petitioners for priority in the payment of its amended claim. Said Judge first filed a memorandum opinion finding that your petitioners were entitled to the right of priority accorded a sovereign in the payment of said amended claim under the rule announced by this court in City and County of Denver vs. Stenger, 295 Fed. 808, and that petitioners had traced into the hands of the Trustee in Bankruptcy $12,979. of the funds previously paid by the City to said Trust Company. Thereafter, said Judge entered an order withdrawing the aforesaid memorandum opinion and filed another memorandum opinion in which he held petitioners were not entitled to the right of priority accorded a sovereign and finding that petitioners had traced only $628.63 into the hands of the Trustee in Bankruptcy of the amount paid by said City to said Trust Company. Thereafter on December 17, 1934, said Judge filed findings of fact as above set forth and conclusions of law that said City of Lincoln was entitled to the payment of $628.63 of said amended claim prior to the payment of claims of general creditors and that petitioner Standard Accident Insurance Company as assignee of said amended claim became entitled to all the rights of said City under said amended claim. On the same day said Judge entered a judgment and decree in accordance with said conclusions of law and allowing exceptions to all parties.

4. Said conclusions of law, judgment and decree are erroneous for the reasons specified in the assignment of errors which is filed herewith, which may be summarized as follows:

102 a. Said City of Lincoln, as an agency of the State of Nebraska, is entitled to priority accorded a sovereign under the common law, which by express Nebraska statute, is made a part of the law of Nebraska. Said statute is Section 49-101 of the Compiled Statutes of Nebraska for 1929 and provides:

"Common law in Force. So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law

within the State of Nebraska. (R. S. p. 31; Ann. 6955; Comp. 1934; R. S. 1913, 3697; C. S. 1922 3085)"

b. Said City of Lincoln, aside from its rights as a sovereign, is entitled to priority because Section 64 b of the Bankruptcy Act, 11 U. S. C. A., Section 104 b, specifically provides that a claimant having priority under a state law, shall also have priority under the bankruptcy law and under the common law which by the Nebraska statute quoted above is adopted as a part of its law, trust funds are entitled to priority if they have augmented the assets of the Trustee. Said Section 64 b provides in part as follows:

"The debts to have priority in advance of the payment of dividends to creditors and to be paid in full out of the bankrupt estates and the order of payment shall be * * * (7) debts owing to any person who by the laws of the states and the United States is entitled to priority."

c. In the absence of a right to priority under the rules given above said City of Lincoln would be entitled to priority under the Federal rule for at least the lowest balance of cash, cash items and bank deposits prior to bankruptcy, which was $13,069.42, instead of $628.63.

d. Said City of Lincoln is entitled to payment from securities deposited with the State of Nebraska by said Trust Company for the specific purpose of taking care of its trust obligations.

5. Petitioners further show to the court that an appeal has been allowed from the aforesaid judgment and decree by the District Court of the United States for the District of Nebraska, Lincoln Division, but in order to make certain that an appeal is properly allowed and presented to this court, the petitioners desire this court to also allow an appeal. Petitioners further show that unnecessary confusion and expense may be avoided without affecting the rights of the parties by permitting the transcript of the record of the appeal allowed by this court to be treated and considered as the transcript of the record in the appeal allowed by the District Court in this proceeding.

Wherefore, your petitioners, feeling aggrieved because of such judgment and decree filed on December 17, 1934, in the above entitled proceeding do hereby pray that
103 this court grant them leave to appeal said judgment and decree to the United States Circuit Court of Appeals for the Eighth Circuit and pray that this appeal may

be allowed and that a citation may be granted and directed to L. A. Ricketts, Trustee of the above named bankrupt estate, commanding him to appear before this court and that a transcript of the record and evidence in said proceeding duly authenticated may be transmitted to this court.

Petitioners further pray that the transcript of the record of the appeal allowed by this court be treated and considered as the transcript of the record in the appeal allowed by the District Court in this proceeding.

CITY OF LINCOLN, NEBRASKA,
and
STANDARD ACCIDENT INSURANCE COMPANY, Petitioners,
By Don W. Stewart,
A. A. Whitworth,
C. B. Paine, Their Attorneys.

United States of America,
District of Nebraska,
Lancaster County—ss.

Don W. Stewart, being first duly sworn upon his oath, deposes and says that he is one of the attorneys for the above named petitioners; that petitioners are each corporations; that he is acquainted with the matters and facts set forth in the foregoing petition and that the same are true as he verily believes and that the appeal therein prayed for is not intended for delay but that he verily believes that injustice has been done.

DON W. STEWART.

Subscribed and sworn to before me this 28 day of December, 1934.

CHARLES B. PAINE,
(Notarial Seal) Notary Public.

(Endorsed): No. 10,213. Petition for Appeal. Filed in U. S. Circuit Court of Appeals on Dec. 29, 1934, E. E. Koch, Clerk.

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104 (Assignment of Errors on Appeal of City of Lincoln, et al., Filed in U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals
Eighth Circuit.

In the Matter of
Lincoln Trust Company, Bankrupt.
Case No. 2314. In Bankruptcy.
In Re Claim of City of Lincoln.

Come now the appellants in the above entitled cause and file the following assignment of errors upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree filed on December 17, 1934, in the District Court of the United States for the District of Nebraska, Lincoln Division.

1. The court erred in holding that the City of Lincoln's amended claim was not entitled to the priority accorded a sovereign at common law, which by Nebraska Statute is made a part of the Nebraska law.

2. The court erred in holding that the amended claim was not entitled to priority for the full amount as a trust fund under the laws of the State of Nebraska.

3. The court erred in holding that only $628.63 of the funds paid by the City of Lincoln to the bankrupt were traced into the hands of the Trustee in Bankruptcy.

4. The court erred in holding the amended claim was not entitled to payment from securities deposited with the Department of Trade and Commerce of the State of Nebraska.

5. The court erred in holding cash and cash items should not be included with cash in the bank account in determining the amount of the funds paid by the City of Lincoln to the bankrupt, which passed to the Trustee in Bankruptcy.

6. The court erred in holding the opinion of a Supreme Court Commissioner of the State of Nebraska should be considered as establishing the rule that the common law right of a sovereign to priority in payment of its claim is not a part of the law of Nebraska.

7. The court erred in sustaining the finding of the
105 Referee that the common law right of a sovereign to priority in the payment of its claim is not a part of the law of Nebraska.

8. The court erred in sustaining the finding of the Referee that the amended claim was not entitled to priority for the full amount as a trust fund under the laws of the State of Nebraska.

9. The court erred in sustaining the finding of the Referee that the amended claim was not entitled to payment from securities deposited with the Department of Trade and Commerce of the State of Nebraska.

10. The court erred in holding that a municipal corporation is not within the provisions of subdivision 7 of Section

64-b as amended, of the Bankruptcy Act (U. S. C. A. Title 11, Section 104-b (7)) allowing priority to "debts owing to any person who by the laws of the State and the United States is entitled to priority."

11. The court erred in refusing to direct the payment of the entire amended claim prior to the payment of claims of general creditors.

Wherefore, appellants pray that the judgment and decree filed in the District Court of the United States for the District of Nebraska, Lincoln Division on December 17, 1934, be modified by directing the payment in full of the amended claim of appellants prior to the payment of the claims of general creditors and for such other and further relief as to the court may seem just and proper.

Dated December 28, 1934.

CITY OF LINCOLN, NEBRASKA,
and
STANDARD ACCIDENT INSURANCE COMPANY, Appellants,
By Don W. Stewart,
A. A. Whitworth,
C. B. Paine, Their Attorneys.

106 United States of America,
State of Nebraska,
Lancaster County—ss.

Don W. Stewart, being first duly sworn upon his oath, deposes and says that he is attorney for the appellants; that appellants are each corporations and for that reason he makes this verification; that he has read over the foregoing assignments of error, knows the contents thereof and that the facts therein stated are true as he verily believes.

DON W. STEWART.

Subscribed and sworn to before me this 28th day of December, 1934.

CHARLES B. PAINE,
Notary Public.

(Notarial Seal)

(Endorsed): No. 10,213. Assignment of Errors. Filed in U. S. Circuit Court of Appeals on Dec. 29, 1934. E. E. Koch, Clerk.

107 (Waiver of Notice of Hearing of Petition for Appeal of City of Lincoln, et al.)

Receipt is hereby acknowledged of a copy of petition for appeal and assignment of errors to be filed in the above entitled court and relating to the decree filed in the District Court of United States for the District of Nebraska Lincoln Division on December 17, 1934, and the undersigned hereby waives notice of hearing on said petition and consents to the immediate hearing of said petition for appeal.

Signed December 27, 1934.

L. A. RICKETTS,
Trustee in Bankruptcy of
Lincoln Trust Company,
Bankrupt,
By R. A. Boehmer,
His Attorney of Record.

(Endorsed): No. 10,213. Waiver of Notice of Hearing on Petition for Appeal. Filed in U. S. Circuit Court of Appeals on Dec. 29, 1934, E. E. Koch, Clerk.

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108 (Order of U. S. Circuit Court of Appeals Allowing Appeal to City of Lincoln, et al.)

United States Circuit Court of Appeals, Eighth Circuit.

November Term, 1934.

Monday, December 31, 1934.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants,
No. 10213. vs.
L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt.

Appeal from the District Court of the United States for the District of Nebraska.

In the Matter of
Lincoln Trust Company, Bankrupt.

In the Matter of the Lincoln Trust Company in the District Court of the United States for the District of Nebraska, Lincoln Division, the City of Lincoln and Standard Accident Insurance Company has filed petition for appeal from judgment

and decree entered by said District Court on December 17, 1934, and also their assignment of errors and a waiver by counsel for appellee of the hearing of said petition for appeal. The said matters having been considered, It is now here ordered by this Court that the appeal prayed for be, and the same is hereby, allowed, the appellant to file with the Clerk of this Court on or before January 10, 1935, a bond for costs in the sum of Two Hundred Fifty ($250.00) Dollars, with good and sufficient security, said bond to be approved by this Court or one of the Judges thereof.

It is further ordered by this Court that the transcript of the record to be filed on the appeal allowed by said District Court be also treated and considered as a transcript of the record on the appeal allowed hereby.

December 31, 1934.

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109 (Citation on Appeal Allowed to City of Lincoln, et al., by U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals, Eighth Circuit.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants,
No. 10213. vs.
L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt.

Appeal from the District Court of the United States for the District of Nebraska.

In the Matter of
Lincoln Trust Company, Bankrupt.

United States of America,

To L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, forty days from and after the date this citation bears date, pursuant to appeal allowed by said Court, wherein the City of Lincoln, Nebraska, and Standard Accident Insurance Company are Appellants and you are appellee, to show cause, if any there be, why the judgment and decree of the District Court of the United States for the District of Nebraska, Lincoln Division, entered December 17, 1934, as in said appeal mentioned,

should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Kimbrough Stone, Senior United States Circuit Judge, this 31st day of December, A. D., 1934.

KIMBROUGH STONE,
Senior United States Circuit Judge,
Eighth Circuit.

Comes Now L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, appellee, and hereby accepts service of the foregoing citation on appeal in the above cause and does hereby enter his appearance in the Circuit Court of Appeals of the Eighth Circuit.

Dated January 2, 1935.

L. A. RICKETTS,
As Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt,
By R. A. Boehmer, &
Perry W. Morton,
His Attorneys of Record.

(Endorsed): No. 10,213. Citation on Appeal allowed by U. S. Circuit Court of Appeals. Filed in U. S. Circuit Court of Appeals on Jan. 5, 1935, E. E. Koch, Clerk.

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110 (Bond on Appeal Allowed to City of Lincoln, et al., by U. S. Circuit Court of Appeals.)

Know All Men By These Presents:

That the Standard Accident Insurance Company of Lincoln, Nebraska, and City of Lincoln, as principals, and Globe Indemnity Company, New York, N. Y., as surety, are held and firmly bound unto L. A. Ricketts, as Trustee in Bankruptcy of the Lincoln Trust Company, in the sum of Two Hundred Fifty Dollars ($250.00) to be paid to said L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, its successors and assigns, for which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Dated this 7th day of January, 1935.

Whereas, a judgment and decree was rendered by the District Court of the United States for the District of Nebraska

Lincoln Division, in the above entitled proceedings on December 17, 1934, from which said persons have petitioned for and have been allowed an appeal by the Circuit Court of Appeals, Eighth Circuit to the said Circuit Court of Appeals, Eighth Circuit,

Now, Therefore, the condition of the above obligation is that if said appellants shall prosecute their appeal to effect and without delay and answer for all damages and costs if said decree be affirmed, then the above obligation to be void; otherwise to remain in full force and effect.

STANDARD ACCIDENT INSURANCE COMPANY, and CITY OF LINCOLN, Principals,
By Don W. Stewart, Their Attorney.

GLOBE INDEMNITY COMPANY,
Surety.
By Merle C. Rathburn. (Seal)

110a

Power of Attorney
From
Globe Indemnity Company

Newark, New Jersey

Know All Men By These Presents, That the Globe Indemnity Company, a New York Corporation, having its principal office in the City of Newark, County of Essex, State of New Jersey, pursuant to the following By-Law, which was adopted by the Directors of the said Company on January 15, 1919, to-wit:

"Article XI, Section 1.—The President, any Vice-President or the General Manager, shall have power and authority to appoint resident Vice-Presidents, resident Assistant Secretaries and Attorneys-in-fact, and to authorize them to execute on behalf of the Company and attach the seal of the Company thereto, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof."

does hereby nominate, constitute and appoint George W. Holmes, S. C. Waugh, Merle C. Rathburn and C. E. Hinds, all of Lincoln, Nebraska, its true and lawful agents and attorneys-in-fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed, any and all bonds and undertakings in its business of guaranteeing the fidelity of persons holding places of public or private trust and guaranteeing the performance of contracts (other than insurance

policies) and all bonds or other undertakings required or permitted in all actions or proceedings or by law required or permitted.

All Such bonds and undertakings as aforesaid to be signed for the Company and the Seal of the Company attached thereto by any two of the said George W. Holmes, S. C. Waugh Merle C. Rathburn or C. E. Hinds.

And Also any and all such bonds and undertakings as aforesaid in penalties not exceeding ($100,000.00) One Hundred Thousand Dollars each, may be signed for the Company and the Seal of the Company attached thereto by any one of the said George W. Holmes, S. C. Waugh, Merle C. Rathburn or C. E. Hinds, individually.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company as fully and amply, to all intents and purposes, as if they were duly executed by the regularly elected officers of said Company.

In Witness Whereof, the Globe Indemnity Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed this 20th day of June, 1927.

(Corporate Seal) (Signed) M. A. CRAIG,
Vice-President.

State of New Jersey,
County of Essex—ss.

On this 20th day of June, A. D. 1927 before the subscriber, a Notary Public of the State of New Jersey, duly commissioned and qualified, came M. A. Craig, Vice-President of the Globe Indemnity Company, to me personally known to be the individual and officer described in, and who executed the preceding instrument, and he acknowledged the execution of the same, and being by me duly sworn, deposed and said, that he is the officer of said Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and the said Corporate Seal and his signature as officer were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation, and that Article XI, Section 1, of the By-Laws of said Company, referred to in the preceding instrument is now in force.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at the City of Newark the day and year first above written.

(Notarial Seal) (Signed) C. H. MILLIGAN,
Notary Public, State of New Jersey.

My Commission Expires Nov. 9, 1930.

110b I, the undersigned, assistant secretary of the Globe Indemnity Company, a New York Corporation, do hereby certify that the original Power Of Attorney, of which the foregoing on the reverse side hereof is a full, true and correct copy, remains in full force and effect and has not been revoked.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Company at the City of New York this

Subscribed and sworn to before me this Jan. 7, 1935.

(Corporate Seal) OSCAR C. KENZE,
Assistant Secretary.

The foregoing bond and surety thereon hereby approved.

January 10, 1935.

KIMBROUGH STONE,
Judge, Circuit Court of Appeals,
Eighth Circuit.

(Endorsed): No. 10,213. Bond on Appeal with Approval of Judge Stone. Filed in U. S. Circuit Court of Appeals on Jan. 10, 1935, E. E. Koch, Clerk.

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111 (Petition of L. A. Ricketts, Trustee, for Appeal, Filed in U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals
Eighth Circuit.

In the Matter of

Lincoln Trust Company, Bankrupt.

Case #2314. In Bankruptcy.

In Re Claim of the City of Lincoln and Standard Accident Insurance Company.

To the Honorable Judges of the United States Circuit Court of Appeals, Eighth Circuit:

Your petitioner, L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, who is the objector in the above entitled cause, respectfully represents that City of Lincoln, Nebraska, and Standard Accident Insurance Company, its assignee, have been allowed by this court an appeal from a certain judgment and decree made in the above entitled cause on December 17, 1934, by the District Court of the United States for the District of Nebraska, Lincoln Division. Your petitioner, the objecting trustee, also considers himself aggrieved by said judgment and decree insofar as it allows priority in the payment of the claim of said City of Lincoln, Nebraska, and Standard Accident Insurance Company, its assignee, in the amount of $628.63, and your petitioner prays this Honorable Court to allow him a cross-appeal from said judgment and decree for the reasons stated in the assignment of errors filed herewith.

Petitioner further shows that in addition to the appeal allowed as aforesaid to the City of Lincoln, Nebraska, and Standard Accident Insurance Company by this court, and in addition to the cross-appeal herewith petitioned for, said City of Lincoln and Standard Accident Insurance Company have also been allowed an appeal from the same judgment by the District Court of the United States for the District of Nebraska, Lincoln Division, and your petitioner has also been allowed a cross-appeal by said District Court; so that from the same judgment and decree there will be the two companion appeals of the said claimant and the two companion cross-appeals of this petitioner. Petitioner prays that the transcript of the record to be filed on the appeal allowed to said City of Lincoln, Nebraska, and Standard Accident Insurance Company by said District Court be treated and considered as a transcript of the record on all
112 appeals and cross-appeals taken from said judgment and decree, including the cross-appeal herewith petitioned for, and that the briefs of the parties to be filed on the said appeal allowed to said City of Lincoln and Standard Accident Insurance Company by said District Court may be treated and considered as the briefs of the parties on all of said appeals and cross-appeals.

Dated January 4, 1935.

L. A. RICKETTS,
Trustee in Bankruptcy of
Lincoln Trust Company,
By R. A. Boehmer &
Perry W. Morton,
His Attorneys.

113 Statement of Case.

For the information of the court in considering the petition for cross-appeal this day filed by the undersigned, L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, this brief statement of the case is respectfully tendered with said petition.

A claim was filed in the matter of Lincoln Trust Company, bankrupt, for the sum of $45,000, representing money which the City of Lincoln paid to said bankrupt, and for which it received what were known as trust certificates, each of which certificates recited in part that bankrupt "holds for investment in Trust, funds belonging to City Treasurer of Lincoln, Nebraska," a stated sum "with interest at three per cent per annum" • • • etc.

There is no dispute as to the amount, nor the validity of the claim, as a general claim, but the trustee filed objections to the allowance of priority to said claim and upon the hearing the Referee denied any priority to the claimant, and allowed the claim as a general claim for the full amount.

Upon review, petitioned for by claimant, the court below entered its judgment and decree, modifying the Referee's order to the extent of allowing priority of payment in the sum of $628.63 and allowing the balance as a general claim. It is on account of the allowance of any priority whatever that this cross-appeal is prayed for. It is the contention of the trustee that the relationship established by the deposit of the funds of the City of Lincoln with said bankrupt was not that of trustee and beneficiary, but rather was that of debtor and creditor.

The sum for which priority was allowed by the District Court on review was the amount of the lowest balance in the general bank account of the bankrupt prior to the date of adjudication in bankruptcy.

Standard Accident Insurance Company is the real party in interest as claimant in that it paid to City of Lincoln the entire amount due it from the bankrupt and is now the assignee of said claim.

The specific contentions of the undersigned trustee appear more fully in the assignment of errors filed with said petition.

Respectfully submitted,

L. A. RICKETTS,
Trustee in Bankruptcy of
Lincoln Trust Company,
By R. A. Boehmer &
Perry W. Morton,
His Attorneys.

(Endorsed): No. 10,218. Petition for Appeal. Filed in U. S. Circuit Court of Appeals on Jan. 5, 1935. E. E. Koch, Clerk.

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114 (Assignment of Errors on Appeal of L. A. Ricketts, Trustee, Filed in U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals
Eighth Circuit.

In the Matter of

Lincoln Trust Company, Bankrupt.

Case No. 2314. In Bankruptcy.

In Re Claim of the City of Lincoln and Standard Accident Insurance Company.

Comes now L. A. Ricketts, Trustee in Bankruptcy, appellee in the above entitled cause, and files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree and judgment filed on December 17, 1934, in the District Court of the United States for the District of Nebraska, Lincoln Division:

1. The court erred in finding and holding that the claimant has, ever since the amendment to its claim was allowed, claimed that it was entitled to priority of a sovereign under the laws of Nebraska.

2. The court erred in finding and holding that the assets of the bankrupt which passed to the Trustee in Bankruptcy included $628.63 of the funds paid by said city to the Bankrupt.

3. The court erred in finding and holding that the Standard Accident Insurance Company became entitled to all the rights of said city under said amended claim.

4. The court erred in finding and holding that the sum of $45,000 paid by said city to the Lincoln Trust Company was to be held in trust for said city, and that it constituted a trust fund.

5. The court erred in modifying the order of the Referee and in allowing priority in the amount of $628.63 and in ordering said sum to be paid to said claimant prior to the claims of general creditors.

6. The court erred in not finding and holding that the funds deposited with said bankrupt did not constitute a trust fund.

114a 7. The court erred in not finding and holding that the said claimant was not entitled to any priority over other creditors.

Wherefore, appellee and cross-appellant prays that the judgment and decree filed in the District Court of the United States for the District of Nebraska, Lincoln Division, on December 17, 1934, be modified by denying any priority to the claim of said City of Lincoln and Standard Accident Insurance Company in any sum whatsoever, and that said claim be allowed as a general claim only, and for such other and further relief as to the court may seem just and proper.

Dated January 4, 1935.

L. A. RICKETTS,
Trustee of Lincoln Trust Company, Bankrupt.
By R. A. Behmer and
Perry W. Morton,
His Attorneys.

(Endorsed): No. 10,218. Assignment of Errors. Filed in U. S. Circuit Court of Appeals Jan. 5, 1935, E. E. Koch, Clerk.

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115 (Waiver of Notice of Hearing of Petition for Appeal of L. A. Ricketts, Trustee.)

Receipt is hereby acknowledged of a copy of petition for cross-appeal and assignment of errors to be filed in the above entitled court and relating to the decree filed in the District Court of United States for the District of Nebraska, Lincoln Division on December 17, 1934, and the undersigned hereby

waive notice of hearing on said petition and consent to the immediate hearing of said petition for cross-appeal.

Signed January 4, 1935.

CITY OF LINCOLN, NEBRASKA,
and
STANDARD ACCIDENT INSURANCE COMPANY,
By Don W. Stewart,
A. A. Whitworth,
Charles B. Paine, Their Attorneys.

(Endorsed): No. 10,218. Waiver of Notice. Filed in U. S. Circuit Court of Appeals on Jan. 5, 1935, E. E. Koch, Clerk.

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116 (Order of U. S. Circuit Court of Appeals Allowing Appeal to L. A. Ricketts, Trustee.)

United States Circuit Court of Appeals, Eighth Circuit.

November Term, 1934.

Tuesday, January 8, 1935.

L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Appellant,
No. 10218. vs.
City of Lincoln, Nebraska, and Standard Accident Insurance Company.

Appeal from the District Court of the United States for the District of Nebraska.

In the Matter of

Lincoln Trust Company, Bankrupt.

In this matter L. A. Ricketts, Trustee in Bankruptcy of the Lincoln Trust Company, has filed his petition for cross-appeal from the judgment and decree entered by the District Court of the United States for the District of Nebraska on December 17, 1934, and also his assignment of errors and a waiver by counsel for the City of Lincoln, Nebraska, and Standard Accident Insurance Company of the hearing on the said petition for cross-appeal, and said matters having been considered, It is now here ordered by this Court that the cross-appeal prayed for, be, and the same is hereby, allowed, the appellant to file with the Clerk of this Court on or before January 21st, 1935, a bond for costs in the sum of Two Hundred Fifty ($250.00) Dollars, with good and sufficient secu-

rity, said bond to be approved by this Court or one of the Judges thereof.

And it is further ordered that the transcript of the record to be filed on the appeal allowed by said District Court to the said City of Lincoln, Nebraska, and Standard Accident Insurance Company be treated and considered as a transcript of the record on the appeal hereby allowed and that briefs of the parties to be filed on the appeal allowed by said District Court be treated and considered as the briefs of the parties on this cross-appeal.

January 8, 1935.

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117 (Order of U. S. Circuit Court of Appeals that Trustee in Bankruptcy be Not Required to Give Cost Bond on Appeal.)

United States Circuit Court of Appeals, Eighth Circuit.

November Term, 1934.

Friday, January 11, 1935.

L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Appellant,

No. 10218. vs.

City of Lincoln, Nebraska, and Standard Accident Insurance Company.

Appeal from the District Court of the United States for the District of Nebraska.

In the Matter of

Lincoln Trust Company, Bankrupt.

By order of this Court of January 8, 1935, a cross-appeal was allowed to L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, and there was inadvertently included in the order in this cause a provision that said Trustee file cost bond in the sum of Two Hunderd ($250.00) Dollars with the Clerk of this Court. As trustees in bankruptcy are not required by law to give bonds on appeal. It is now here ordered by this Court that such bond be not required of the trustee in his cause.

January 11, 1935.

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118 (Citation on Appeal Allowed to L. A. Ricketts, Trustee, by U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals, Eighth Circuit.

L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Appellant,

No. 10218.

vs.

City of Lincoln, Nebraska, and Standard Accident Insurance Company.

Appeal from the District Court of the United States for the District of Nebraska.

In the Matter of

Lincoln Trust Company, Bankrupt.

United States of America,

To City of Lincoln, Nebraska, and Standard Accident Insurance Company.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, forty days from and after the date this citation bears date, pursuant to appeal allowed by said Court, wherein L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, is Appellant and you are Appellee, to show cause, if any there be, why the judgment and decree of the District Court of the United States for the District of Nebraska, Lincoln Division, entered December 17, 1934, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Kimbrough Stone, Senior United States Circuit Judge in and for the Eighth Circuit, this 8th day of January, A. D. 1935.

KIMBROUGH STONE,
Senior United States Circuit Judge in and for the Eighth Circuit.

Service of the foregoing citation on appeal accepted this 10th day of January, 1935.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Attorneys for City of Lincoln, Nebraska, and Standard Accident Insurance Company.

(Endorsed): No. 10,218. Citation on Appeal Allowed by U. S. Circuit Court of Appeals. Filed in U. S. Circuit Court of Appeals on Jan. 11, 1935. E. E. Koch, Clerk.

111 And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellants in Cause No. 10213.)

United States Circuit Court of Appeals,
Eighth Circuit.

City of Lincoln, Nebraska, et al., Appellants,
No. 10,213. vs.
L. A. Ricketts, as Trustee, etc.

The Clerk will enter my appearance as Counsel for the Appellants.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
1412 Sharp Bldg.,
Lincoln, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 5, 1935.

(Appearance of Counsel for Appellee in Cause No. 10213.)

The Clerk will enter my appearance as Counsel for the Appellee.

R. A. BOEHMER,
PERRY W. MORTON,
both of 126 So. 11th Str.,
Lincoln, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 16, 1935.

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112 (Appearance of Counsel for Appellant in Cause No. 10218.)

United States Circuit Court of Appeals,
Eighth Circuit.

L. A. Ricketts, as Trustee in Bankruptcy, etc., Appellant,
No. 10218 vs.
City of Lincoln, Nebraska, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

R. A. BOEHMER,
PERRY W. MORTON,
both of 126 So. 11th Str.,
Lincoln, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 16, 1935.

(Appearance of Counsel for Appellees in Cause No. 10218.)

The Clerk will enter my appearance as Counsel for the Appellees.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
1412 Sharp Bldg.,
Lincoln, Nebr.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 14, 1935.

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113 (Appearance of Counsel for Appellants in Cause No. 10219.)

United States Circuit Court of Appeals,
Eighth Circuit.

City of Lincoln, Nebraska, et al., Appellants,
No. 10219. vs.
L. A. Ricketts, as Trustee in Bankruptcy, etc.

The Clerk will enter my appearance as Counsel for the Appellants.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
1412 Sharp Bldg.,
Lincoln, Nebr.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 14, 1935.

(Appearance of Counsel for Appellee in Cause No. 10219.)

The Clerk will enter my appearance as Counsel for the Appellee.

R. A. BOEHMER,
PERRY W. MORTON,
both of 126 So. 11th Str.,
Lincoln, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 16, 1935.

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114 (Appearance of Counsel for Appellant in Cause No. 10220.)

United States Circuit Court of Appeals,
Eighth Circuit.

L. A. Ricketts, as Trustee in Bankruptcy, etc., Appellant,
No. 10220. vs.
City of Lincoln, Nebraska, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

R. A. BOEHMER,
PERRY W. MORTON,
both of 126 So. 11th Str.,
Lincoln, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 16, 1935.

(Appearance of Counsel for Appellees in Cause No. 10220.)

The Clerk will enter my appearance as Counsel for the Appellees.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
1412 Sharp Bldg.,
Lincoln, Nebr.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 14, 1935.

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115 (Order of Submission.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1935.

Thursday, March 21, 1935.

City of Lincoln, Nebraska, et al., Appellants,
No. 10213. vs.
L. A. Ricketts, as Trustee in Bankruptcy, etc.

Appeal from the District Court of the United States for the District of Nebraska.

L. A. Ricketts, Trustee in Bankruptcy, etc., Appellant,
No. 10218. vs.
City of Lincoln, Nebraska, et al.

Appeal from the District Court of the United States for the District of Nebraska.

City of Lincoln, Nebraska, et al., Appellants,
No. 10219. vs.
L. A. Ricketts, as Trustee in Bankruptcy, etc.

Appeal from the District Court of the United States for the District of Nebraska.

and

L. A. Ricketts, Trustee in Bankruptcy, etc., Appellant,
No. 10220. vs.
City of Lincoln, Nebraska, et al.

Appeal from the District Court of the United States for the District of Nebraska.

These causes, Nos. 10213, 10218, 10219 and 10220, having been called for hearing in their regular order, are argued together, and argument was commenced by Mr. Don W. Stewart for the City of Lincoln, et al., continued by Mr. Perry W. Morton and Mr. R. A. Boehmer for L. A. Ricketts,
116 Trustee, etc., and concluded by Mr. Don W. Stewart for the City of Lincoln, et al.

Thereupon, these causes were submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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117 (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 10,213.—MARCH TERM, A. D. 1935.

City of Lincoln, Nebraska, et al., Appellants, vs. L. A. Ricketts, as Trustee in Bankruptcy, etc., Appellee.	Appeal from the District Court of the United States for the District of Nebraska.

No. 10,218.—MARCH TERM, A. D. 1935.

L. A. Ricketts, Trustee in Bankruptcy, etc.
Appellant,
vs.
City of Lincoln, Nebraska, et al.,
Appellees.

Appeal from the District Court of the United States for the District of Nebraska.

No. 10,219.—March Term, A. D. 1935.

City of Lincoln, Nebraska, et al.,
Appellants,
vs.
L. A. Ricketts, as Trustee in Bankruptcy, etc.,
Appellee.

Appeal from the District Court of the United States for the District of Nebraska.

No. 10,220.—March Term, A. D. 1935.

L. A. Ricketts, Trustee in Bankruptcy, etc.,
Appellant,
vs.
City of Lincoln, Nebraska, et al.,
Appellees.

Appeal from the District Court of the United States for the District of Nebraska.

[April 27, 1935.]

Mr. Don W. Stewart (Mr. A. A. Whitworth, Mr. Charles B. Paine, and Messrs. Stewart, Stewart & Whitworth were with him on the brief), for City of Lincoln, et al.

Mr. Perry W. Morton and Mr. R. A. Boehmer for L. A. Ricketts, as Trustee in Bankruptcy, etc.

Before Gardner, Woodrough and Van Valkenburgh, Circuit Judges.

GARDNER, Circuit Judge, delivered the opinion of the Court.

There is involved in these appeals the right of the City of Lincoln, Nebraska, to a priority in the payment of its claim of $45,509.00 against the Lincoln Trust Company, bankrupt. The lower court allowed priority in the amount of $628.63, and denied priority as to the balance of the claim, but allowed it as a general claim. Both parties have appealed. There is no dispute as to the facts so far as they are disclosed by the record, though there may be some dispute as to what facts may properly be inferred from those establi-

The City of Lincoln, a municipal corporation, organized under special charter, on September 26, 1928, paid to the Lincoln Trust Company the sum of $45,000.00. The character of the business of the Lincoln Trust Company is not shown in any detail, but it is stipulated that at all times mentioned in the proceeding, and up to July 9, 1932, it was a corporation "organized and existing under the laws of the State of Nebraska and engaged in conducting a general trust company business." On receipt of these funds from the city treasurer, it delivered to the city treasurer nine certificates of $5,000.00 each, in substantially the following form:

"No. Lincoln, Nebraska, Sept. 26, 1928 No. ....

"THIS IS TO CERTIFY that the LINCOLN TRUST COMPANY of Lincoln, Nebraska, holds for investment in Trust, funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand & no/100 Dollars ($5,000.00), with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19...

"This Trust Certificate bears no per cent interest after maturity.

LINCOLN TRUST COMPANY,
By (S.) Howard Hadley, Secretary."

The funds so received were placed in the general bank account of the Trust Company and were carried on the books of the Trust Company in its general ledger account and not on the books or accounts of the trust department. The entry in the general ledger account is as follows:

"Trust Certificate	City Treasurer of Lincoln	Credit	Balance
10-1-28	By 160-162 to 169 inclusive $5000.00 each at 3% on demand	45,000.00	45,000.00"

The Trust Company paid interest to the City at the rate of 3 per cent per annum up to March 26, 1932. On June 14, 1932, the City demanded payment of the principal and accrued interest on these certificates, the demand being refused, and on July 9, 1932, the Trust Company was adjudged a bankrupt. At the time these funds were paid to the Trust Company it, as principal, and the Standard Accident Insurance Company as surety, executed a bond to the City, by which it was agreed that this money should be repaid to the City upon its demand.

At the time the City paid the $45,000.00 to the Trust Company, it had no separate bank account for its trust department, but thereafter, on October 3, 1931, it created a trust department bank account, and at that time transferred to that account $49,679.17, a sum sufficient to take care of all its trust liabilities, except the amount due the City of Lincoln, which was not included in the account. Up to the time of the demand of payment the lowest balance in cash in the general bank account of the Trust Company was $7,875.97, and on that date the Trust Company had in addition certain so-called cash items amounting to $5,193.45. Following the City's demand, the Trust Company took from its general account $44,982.46, and transferred it to the trust department of the Trust Company, where it was set up as a new account designated "Segregated Assets." This fund was to cover certain items of principal payments, interest, and other payments that were received after April 7, 1932. At the time of adjudication in bankruptcy there was a balance in this segregated assets account of $25,097.09.

Out of its general bank account the Trust Company also received funds from various persons for which it issued receipts, and which accounts were known as "Modern Investments." These were in the nature of installment contracts for the purchase of real estate mortgage bonds, and at the time the City Treasurer paid the Trust Company the funds here in controversy, the money in all the Trust Company's accounts was carried in the general bank account of the Company.

The appellant Standard Accident Insurance Company, pursuant to the terms of its bond, paid the City the amount of its claim, whereupon the claim was assigned to the Insurance Company. The City first filed a general claim against the bankrupt, which was duly allowed. Subsequently, on leave granted, the City filed an amended claim, seeking priority of payment over general creditors. The referee denied the right of priority asserted by the City, and on review the lower court modified the order of the referee by allowing priority in the amount of $628.63.

It is here urged (1) that a trust was created by an agreement of the parties; and (2) that the City has the right of a sovereign to priority in payment. Other questions are urged, but in the view we have taken on these issues, they are not material to a determination of the case.

As has been observed, the referee was of the view that no trust relation was created by the contract of the parties. The lower court expressed very grave doubts on this question, but concluded that as there was nothing in the record to indicate the trust nature of the transaction, except the contract itself, and the fact that interest was paid, and the fact that the Trust Company felt perfectly free to use the money in any manner it saw fit, the issue should be resolved in favor of the existence of the trust relation. The City is asserting this trust relation and its consequent right of priority, and the burden was upon it to prove facts giving rise to such a relation. Whether or not the payment of these funds to the Trust Company gave rise to a trust relation depends upon the mutual understanding and intention of the parties at the time of the payment. *Northern Sugar Corp.* v. *Thompson,* (CCA8) 13 Fed. (2d) 829; *Keyes* v. *Paducah & I. R. Co.,* (CCA6) 61 Fed. (2d) 611.

The instrument upon which the Insurance Company relies is very meager and ambiguous. It certifies that the Trust Company holds for investment in trust funds belonging to the City Treasurer. Neither the instrument nor any acts of the parties, nor other testimony, indicates what, if any, investments were in contemplation, when, if at all, such investments were to be made, nor on whose behalf they were to be made. Apparently, it was in contemplation of the parties that the money should become the funds of the Trust Company because the Trust Company not only agreed to pay interest on these funds, but it in fact did pay interest thereon for some four and a half years, and no investment was ever ma e. Again, the funds were not kept separate, but went into the g n l bank account of the Trust Company with other general funds. In ad-

dition to this, it is significant that the Trust Company gave bond, not for the faithful discharge of any duty it may have assumed as trustee in the investment of these funds, but for the payment of the funds to the City upon the City's demand, and the surety on the bond, now the beneficial owner of the claim, paid the amount of money due the city, together with interest.

Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money. *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174; *Loudon* v. *Shelby County Taxing Dist.*, 104 U. S. 771; *Maryland Cas. Co.* v. *Omaha Elec. Light & Power Co.*, (CCA8) 157 Fed. 514; *Davey* v. *First Natl. Bank of Deadwood* (S. D.), 72 N. W. 83. The provision for the payment of interest is inconsistent with the thought that the title to this money remained with the City. Certainly, the provision for the payment of interest implied that the Trust Company had the right to use it for its own benefit, and apparently the parties so understood and so treated the transaction. Without any objection or protest on behalf of the City, the funds were turned into the general bank account of the Trust Company, and so far as appears from the record, no instructions were ever given the Trust Company, and no inquiry made by the City, with reference to these funds for four and a half years, during all of which time the City collected its semi-annual interest from the Trust Company.

It is possible that the City may have had two purposes in view in paying this money to the Trust Company. One was a possible future investment, and the other was the securing of interest from the funds. The last purpose is definitely indicated not only by the contract but by all the subsequent acts of the parties, and the second purpose was inconsistent with the first. Had the first purpose in fact been carried out, and some investment actually made on behalf of the City, the property invested in would thereby be segregated and set apart and held in trust for the City. The funds, with the knowledge and consent of the City, were not handled as trust funds, and if the parties originally intended creating a trust relation, that purpose was manifestly subsequently abandoned. *City Council of Charleston* v. *Elliott*, (CCA4) 73 Fed. (2d) 920; *Keyes* v. *Paducah & I. R. Co.*, (CCA6) 61 Fed. (2d) 611; *Northern Sugar Corp.* v. *Thompson*, (CCA8) 13 Fed. (2d) 829; *Santee Timber Corp.* v. *Elliott*, (CCA4) 70 Fed. (2d) 179; *McNulta* v. *West Chicago Park Com'rs*, (CCA7) 99 Fed. 900; *Swan* v. *Children's Home Society*, (CCA4) 67 Fed. (2d) 84; *State* v. *Bartley* (Neb.), 58 N. W. 172; *Board* v. *Union Trust Co.* (Mich.), 99 N. W. 373; *City of Aberdeen* v. *Natl. Surety Co.* (Wash.), 275 Pac. 62;

Lewis v. *Dark Tobacco Growers' Coop. Assn.* (Ky.), 57 S. W. (2d) 8.

In *City Council of Charleston* v. *Elliott, supra,* the City asserted right of priority for deposits made by it to meet tax anticipation notes executed by the City. The claim of the City was that the deposits were trust funds in the hands of the bank. After reciting that the deposits were made under an agreement that tax collections would be deposited in special accounts separate from the general deposit account of the City and that the tax anticipation notes of each tax year would be paid from the account in which the taxes for that year had been deposited, it is said:

"The funds so deposited were mingled by the bank with its general assets; and there is nothing to show that it was contemplated by any one that they should be segregated from the general funds of the bank or that the bank should handle them as trust funds held by it as a fiduciary. On the contrary, it appears that the bank paid interest on the deposit balances in the tax accounts. It is true that in December, 1931, there was talk of withdrawing a part of the funds from the bank in order that a division of deposits might be made among other banks of the city and that at that time the bank opposed the withdrawals on the ground that the deposits were trust funds, as well as on the ground that their withdrawal would ruin the bank; but not even then was there any suggestion that the funds deposited by the city were being segregated from the other funds of the bank or were being handled otherwise than as funds received under general deposits. * * *

"The principal argument made in behalf of the city is that the conversations in December show that the deposits in question were trust funds and that they should be so treated by the court, irrespective of such incidental matters as the handling of the funds and the payment of interest thereon. We think, however, that greater weight should be given to the manner in which the deposits were made, to the way in which they were handled by the bank without objection from the city, and to the fact that interest was paid upon them, than to mere language used in describing them, if this language were inconsistent with the nature of the transactions as shown by what the parties did, for it is axiomatic that equity regards substance and not form."

In the absence of any writing clearly indicating the intention of the parties, in attempting to determine that intention we are inclined to give more heed to what was done by the parties than to what was said by them.

Even though the money was paid with the thought of a possible future investment, this special purpose does not in itself give rise to a trust relation. *Blakey* v. *Brinson,* 286 U. S. 254; *Mark* v. *Westlin* (D. C.), 48 Fed. (2d) 609; *Kershaw* v. *Kimble,* (CCA10) 65 Fed. (2d) 553; *Northern Sugar Corp.* v. *Thompson,* (CCA8) 13 Fed. (2d) 829.

What is said by the Supreme Court of Nebraska in *State* v. *Bartley, supra,* seems here apposite. It is there said:

"Who ever heard of that kind of a deposit of money being paid out on checks, or of a banking institution paying for the privilege of holding a special deposit of funds? The identical moneys deposited are not required to be returned. Obviously, the bank receiving them had the right to use and control the money as its own. It could loan the funds for the purpose of earning the money with which to pay the stipulated interest due the state."

In *Board* v. *Union Trust Co., supra,* it is said:

"It would be doing violence to all experience to say that it was intended that the bank should keep this fund intact as a special deposit, and at the same time pay interest thereon to the depositor."

In *Swan* v. *Children's Home Society, supra,* quoting from *Scammon* v. *Kimball,* 92 U. S. 362, it is said:

" 'Where the agreement is to pay interest, the agreement is obligatory; but the fact that the depositary agreed to pay interest affords very strong evidence that the title to the money deposited passed out of the depositor by the act of making the deposit.' "

In the recent case of *Lewis* v. *Dark Tobacco Growers' Coop. Assn., supra,* it is said:

"It is a matter of common knowledge that interest is paid on money for the use of it. Webster's Unabridged Dictionary defines the word 'interest' as follows: 'A rate per cent of money paid for the use of money or the forbearance of demanding payment of a debt.' "

We conclude that the instrument relied upon, in view of the contemporaneous and subsequent acts of the parties thereto, and viewed in the light of the surrounding facts and circumstances, did not create a trust relation between the City and the Trust Company. But it is urged by appellant Insurance Company that if the money was paid to the Trust Company as a deposit then it became a trustee *ex maleficio* because it had no right to accept depos-

its. The Trust Company in this transaction was not in the banking sense of the word receiving deposits; but we are of the view that the transaction resulted in the creation of the relation of debtor and creditor. The Trust Company did have the power to borrow money, and this it did, paying interest for the use thereof, and giving a bond in the nature of security. The City has received the benefit of the transaction, having accepted from time to time the interest, and knowingly participated therein. It is hardly in position to come into a court of equity repudiating or casting aspersions upon the transaction. It must come into court with clean hands.

It is earnestly urged that by right of sovereignty, the City is entitled to priority in the payment of its claim. At common law, the Crown had a priority over all subjects for the payment of debts due it. In a receivership case arising in a state where the common law prevailed without statutory modification, and where the Supreme Court of the State had not theretofore passed upon the question, we held that such prerogative right inhered in a city as an agency of the state exercising a delegated sovereignty. *City and County of Denver* v. *Stenger*, (CCA8) 295 Fed. 809.

In *Fiman* v. *State of South Dakota*, (CCA8) 29 Fed. (2d) 776, we held the rule not applicable to a settlement in the distribution of the assets of a national bank because the National Bank Act, providing for a ratable distribution of the assets of an insolvent national bank, constitutes a complete code of laws covering the dissolution of national banks and the manner of payment of their debts.

The question of the right of priority in payment of claims against a bankrupt estate is covered by Section 64-b of the Bankruptcy Act, which, so far as here pertinent, provides as follows:

"The debts to have priority in advance of the payment of dividends to creditors and to be paid in full out of the bankrupt estates and the order of payment shall be * * * (7) debts owing to any person who by the laws of the States or the United States is entitled to priority; Provided, That the term 'person' as used in this section shall include corporations, the United States, and the several States and Territories of the United States."

It is contended that this section of the Bankruptcy Act preserves the City's right as a sovereign to priority in payment of its debt in the provision that "debts owing to any person who by the laws of the States or the United States is entitled to priority." It is observed that the statute defines the scope to be given to the term "person", it being provided that it shall include "corporations,

the United States, and the several States and Territories of the United States." It makes no mention of municipalities, counties, or other subdivisions of the Government, and hence, we think they are necessarily excluded.

In *Davis* v. *Pringle*, 268 U. S. 315, the court considered a contention that the United States had a right to priority in payment of claims arising out of the federal control of railroads. The matter arose in connection with claims against a bankrupt estate. As Section 64-b then stood, it did not specifically name the United States. In the course of the opinion by Justice Holmes it is, among other things, said:

"It may be assumed that the priority must be found if at all in the Bankruptcy Act and in its supposed incorporation of Rev. Stats. Sec. 3466. That Act, as was said in *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, 160, 'takes into consideration * * * the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment.' It was passed with the United States in the mind of Congress as is shown by the exception of debts due as taxes levied by the United States from the discharge in Sec. 17-a(1), the limitation on debts owing to the United States as a penalty in Sec. 57-j. and the provisions as to priority in Sec. 64 with which we are principally concerned. By 'a' of that section 'The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States * * * in advance of the payment of dividends to creditors.' This taken by itself would seem to exclude other debts. But the section goes on in 'b' to give priority in the order named to '(5) debts owing to any person who by the laws of the States or the United States is entitled to priority,' and the Government argues that by Sec. 1(19) 'persons' shall include corporations and that the United States is a corporation and therefore within these words. Being within them, it is said, it is entitled to priority by a law of the United States, the well known Rev. Stat. Sec. 3466. It is said that no other person except the United States itself can be discovered who is given the right by its laws."

The court held that to extend the definition of "persons" to include the United States would be inconsistent with the context, and denied the claim of priority, even though by specific general statute the right of priority was given.

If, in the instant case, it be conceded that the City as a sovereign had the prerogative right of priority of payment of its

claims, yet in so far as such claims are urged against a bankrupt estate, the priority will not be recognized unless within the provisions of the bankruptcy law which specifically provides for a priority.

In *Fiman* v. *State of South Dakota, supra,* we said:

"The National Bank Act (12 USCA Secs. 21-200) provides for a ratable distribution of the assets of an insolvent national bank, constitutes a complete code of laws for the organization, control, and dissolution of national banks and the manner of payment of their debts, and even a federal statute, general in nature, providing for prior payments of debts due the United States is not effective as against its provisions."

The asserted right of priority of payment is not a lien that attached to the property any more than the right of the United States to priority given it by Revised Statutes, Sec. 3466, considered by the Supreme Court in *Davis* v. *Pringle, supra,* is such a lien, and the right of priority in payment of claims against a bankrupt estate, other than those based upon specific liens, must be found in the Bankruptcy Act.

We conclude that there was no right to priority of payment of the City's claim, and the judgment appealed from is therefore modified to the extent of disallowing any part of the City's claim as a prior claim, and as so modified the judgment appealed from is

Affirmed.

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128 (Decree in Causes Nos. 10213, 10218, 10219 and 10220.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1935.

Monday, April 29, 1935.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants,
No. 10,213. vs.
L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt.

Appeal from the District Court of the United States for the District of Nebraska.

L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Appellant,
No. 10,218. vs.
City of Lincoln, Nebraska, and Standard Accident Insurance Company.

Appeal from the District Court of the United States for the District of Nebraska.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants,
No. 10,219. vs.
L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt.

Appeal from the District Court of the United States for the District of Nebraska.

and

L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Appellant.
No. 10,220. vs.
City of Lincoln, Nebraska, and Standard Accident Insurance Company.

Appeal from the District Court of the United States for the District of Nebraska.

129 These Causes came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and were argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court appealed from in these causes be, and the same is hereby, modified to the extent of disallowing any part of the City's claim as a prior claim and as so modified the said order is affirmed with costs against the City of Lincoln, Nebraska, and Standard Accident Insurance Company.

It is further ordered by this Court that L. A. Ricketts as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, have and recover against the City of Lincoln and Standard Accident Insurance Company the sum of ..... Dollars for his costs in this behalf expended and have execution therefor.

April 29, 1935.

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130 In the United States Circuit Court of Appeals, Eighth Circuit.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants,
Numbers 10,213 and 10,219. vs. In Bankruptcy.
L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, Appellee.

Appeal from the District Court of the United States for the District of Nebraska, Lincoln Division. Hon. J. A. Donohoe, District Judge.

Petition of Appellants for Rehearing.

Don W. Stewart,
A. A. Whitworth,
Charles B. Paine,
Stewart, Stewart & Whitworth,
Attorneys for Appellants,
1412 Sharp Building,
Lincoln, Nebraska.

Petition of Appellants for Rehearing.

Come now the appellants and petition the court to grant a rehearing for the reason material matters of law and
131 fact have been inadvertently overlooked by the court in the following particulars:

1. The court has inadvertently misconstrued the Bankruptcy Act in denying a municipal corporation the same right of priority as is given any other corporation and in citing Davis vs. Pringle, 268 U. S. 315, as authority for its finding, inadvertently overlooked the fact that Section 64B (7) of the Bankruptcy Act was amended for the purpose of repudiating the interpretation placed upon it by such case and has failed to properly apply the principle announced by the Supreme Court in such case.

2. The court has inadvertently placed an erroneous construction on the evidence in holding that no trust relation existed by agreement of the parties.

3. The court in assigning as a reason for the non-existence of a trust ex maleficio, the fact that the transactions between the City of Lincoln and the Lincoln Trust Company constituted a loan, inadvertently overlooked the fact that it is universally held that a loan of public funds for private purposes is illegal, and consequently regardless of what interpretation is placed upon the transaction, it must follow that either an expressed trust or a trust ex maleficio was created.

Wherefore, appellants respectfully pray the court to grant this petition for rehearing.

Respectfully Submitted,

CITY OF LINCOLN, NEBRASKA, and STANDARD ACCIDENT INSURANCE COMPANY, Appellants,
By Don W. Stewart,
A. A. Whitworth,
Charles B. Paine,
Attorneys for Appellants.

132 Certificate of Counsel.

The undersigned counsel for appellants in the above entitled appeal does hereby certify that he believes the foregoing petition for rehearing is well founded in law; that it presents material matters of law and fact inadvertently overlooked by the court as shown in its opinion, and that said petition is not filed for vexation or delay, but is presented in good faith and for the reasons stated therein.

DON W. STEWART.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 25, 1935.

(Order Denying Petition for Rehearing in Causes Nos. 10213 and 10219.)

May Term, 1935.

Wednesday, July 3, 1935.

The petition for a rehearing filed by counsel for the appellants in these causes having been considered, It is now here ordered by this Court that said petition for rehearing, be, and the same is hereby, denied.

July 3, 1935.

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133 (Motion to Stay Issuance of Mandate in Causes Nos. 10213, 10218, 10219 and 10220.)

In the United States Circuit Court of Appeals, Eighth Circuit.

In Bankruptcy.

Nos. 10213, 10218, 10219 and 10220.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants & Cross-Appellees,

vs.

L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, Appellee & Cross-Appellant.

Come now City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants and Cross-Appellees in the above entitled matter, and show to the court that they intend to file an application to the Supreme Court of United States for certiorari as soon as a petition, record and briefs can be completed and within the time provided by law.

Wherefore, they pray that the mandate of this court be stayed and withheld for thirty days from the date on which mandate would otherwise be issued.

Dated this 11th day of July, 1935.

DON W. STEWART,
A. A. WHITWORTH,
C. B. PAINE,
STEWART, STEWART & WHITWORTH,
Attorneys for Appellants and Cross-Appellees.

134 The undersigned counsel for the above named appellants and cross-appellees in the above entitled action does hereby certify that the foregoing motion is not filed for the purpose of delay but is presented in good faith and for the reasons therein stated.

DON W. STEWART.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 12, 1935.

(Order Staying Issuance of Mandate in Causes Nos. 10213, 10218, 10219 and 10220.)

May Term, 1935.

Monday, July 15, 1935.

On Consideration of the motion of the City of Lincoln, Nebraska, et al., for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein, be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

July 15, 1935.

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135 (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in certain causes in said Circuit Court of Appeals wherein the City of Lincoln, Nebraska, et al., were Appellants and L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, was Appellee, No. 10213, and wherein L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, was Appellant and City of Lincoln, Nebraska, et al., were Appellees, No. 10218, and wherein the City of Lincoln, Nebraska, et al., were Appellants and L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, was Appellee, No. 10219, and wherein L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, was Appellant and City of Lincoln, Nebraska, et al., were Appellees, No. 10220, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this seventeenth day of July, A. D. 1935.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, limited to the question of the application of sec. 64b of the Bankruptcy Act.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied [illegible]tition shall be treated as though filed in response to

Office Supreme Court, U.S.
FILED
AUG 7 1935
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number 348

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONERS,
V.
L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

KARL W. KINDLEBERGER,
DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONERS,
V.
L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

KARL W. KINDLEBERGER,
DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

To The Honorable Justices of The Supreme Court of The United States:

The petitioners, City of Lincoln, Nebraska, and Standard Accident Insurance Company, pray that a writ of cer-

tiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above case on April 27, 1935, reversing the judgment of the District Court of Nebraska (R. 114).

QUESTIONS PRESENTED.

1. Whether a municipal corporation is within the provisions of Subdivision (7), Section 64b, as amended, of the Bankruptcy Act, allowing priority to:

> "debts owing to any person who by the laws of the States or the United States is entitled to priority: **Provided,** that the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

2. Whether a trust relation existed under the terms of a writing which provided that a trust company "* * * holds for investment in trust, funds belonging to City * * *."

3. Whether a trust company, by accepting public funds under circumstances making such acceptance illegal, thereby became a trustee ex maleficio.

4. Whether the rule under the Constitution and statutes of Nebraska, that claims for trust funds should be given priority if such funds augmented the assets of the trustee, should be followed by the federal courts.

STATUTE INVOLVED.

The Bankruptcy Act (C. 406, Sec. 15, 44 Stat. 666, 11 U. S. C. A., Sec. 104b), provides in part as follows:

> "The debts to have priority in advance of the payment of dividends to creditors and to be paid in full out of the bankrupt estates and the order of payment shall be * * * (7) debts owing to any person who by the laws of the states or the United

States is entitled to priority; provided, that the term 'person' as used in this section shall include corporations, the United States and the several states and territories of the United States."

STATEMENT.

Petitioners' claim to a priority in the payment of the claim of the City of Lincoln in the amount of $45,509.00 against the Lincoln Trust Company, Bankrupt, was denied (R. 114).

There is practically no dispute as to the facts and most of them are covered by a stipulation (R. 68). In substance it is shown by the stipulation that the City of Lincoln, Nebraska, a municipal corporation, paid to the Lincoln Trust Company, sometimes referred to as the "Bankrupt", the sum of $45,000.00. At that time the Bankrupt was engaged in conducting a general trust company business under the laws of Nebraska with its place of business at Lincoln, Nebraska. Upon receiving such money the Bankrupt delivered to the City nine certificates for $5,000.00 each which were identical except each bore a different number. The following is a copy of one of the certificates (R. 68):

"No. Lincoln, Nebraska, Sept. 26, 1928 No.....

"THIS IS TO CERTIFY that the LINCOLN TRUST COMPANY of Lincoln, Nebraska, holds for investment in Trust, funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand & no/100 Dollars ($5,000.00) with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19.....

"This Trust Certificate bears no per cent interest after maturity.

LINCOLN TRUST COMPANY
By (S.) Howard Hadley, Secretary."

The $45,000.00 was placed by the Bankrupt in its general fund and the following entry was made on a ledger sheet of the bankrupt (R. 68):

"Trust Certificate	City Treasurer of Lincoln	Credit	Balance
10-1-28	By 160-162 to 169 inclusive $5000.00 each at 3% on demand	45,000.00	45,000.00"

Thereafter the Bankrupt paid interest to the City at the rate of 3 per cent per annum up to March 26, 1932. No further interest was paid nor has the principal ever been paid (R. 69). The trust certificates issued to the City together with other trust certificates outstanding amounted at that time to approximately $64,000.00 (R. 71). At the time the City paid the $45,000.00 the Bankrupt had no separate bank account for its trust department, but on October 3, 1931, it created a trust department bank account by depositing in a special account in a Lincoln, Nebraska, bank $49,679.17, which amount was withdrawn from its general account with the same bank. This deposit included all trust funds held by the Bankrupt except the fund held for the City, which was not included because the Bankrupt did not have sufficient funds (R. 71). The transfer did not reduce its cash on hand below the amount set forth in the next paragraph (R. 72).

On June 14, 1932, the City demanded the principal and accrued interest on its certificates which was refused by the Bankrupt (R. 73). Up to that time the lowest balance of cash in its general bank account was $7875.97 on May 13, 1932, and on that same date Bankrupt had in addition thereto cash items of $5193.45 (R. 72).

On June 15, 1932, the day following the City's demand, the Bankrupt took from its general account $44,982.46

and transferred it to the trust department of the trust company where it was set up on the trust department books as "Segregated Assets".

The amount of this fund was equal to the amount of payments made after April 7, 1932, by certain borrowers and mortgagors owing money to the Lincoln Trust Company (R. 80) plus the amount received by the Lincoln Trust Company after April 7, 1932, from certain customers under the terms of certain Eltelic contracts between the Trust Company and its customers whereby the Trust Company agreed to pay from its own funds premiums due on insurance policies held by the customers (R. 75-78). While no special items of liability were set up against the fund segregated when it was transferred to the trust department (R. 72) it appears that the purpose was to enable the Lincoln Trust Company to pay from this special fund indebtedness owed by it to insurance companies for premiums and to persons purchasing bonds from it evidencing a partial interest in the mortgages upon which payments were made and there has been no claim filed with the Receiver by either the bondholders or by the insurance companies to which premiums were owed or by the persons making said payments, asserting that the amounts so paid were held in trust by the Bankrupt as disclosed by the record in this case and it must be assumed, and we contend the fact to be that the segregation of this amount was for the benefit of general creditors of the bankrupt (R. 72-80). The lowest balance in that account from the time it was created until the trust company closed was $25,097.09, on the day it closed and this amount was turned over to the receiver in bankruptcy and then by the receiver to the trustee in bankruptcy (R. 72).

The assets in the trust department, exclusive of the segregated assets account, were sufficient to take care of all liabilities of the trust department, not, of course, including the claim of the City (R. 72).

The Bankrupt had on deposit with the Department of Trade & Commerce of the State of Nebraska when it closed, securities in the principal sum of $47,000.00 which were held as required by the provisions of Section 8-209, C. S. of Nebr. 1929, for the payment of trust liabilities of the Bankrupt (R. 69).

The City filed a general claim against the Bankrupt for $45,509.00 (R. 5) which was allowed the day it was filed (R. 8). Subsequently the City was given leave to file an amended claim seeking priority in the payment of its claim (R. 10). An amended claim was filed (R. 10). Appellee filed objections to the allowance of any priority (R. 14).

On December 10, 1933, a hearing was held on the City's claim of priority and the matter was thereafter submitted to the Referee on written briefs of the parties (R. 66). On February 6, 1934, the right to priority not yet having been determined by the Referee, the appellee asked leave to withdraw its submission of the case, to file additional objections to the claim, and to offer further evidence in support thereof showing that the Standard Accident Insurance Company had paid to the City the amount of its claim (R. 16). The Referee granted the appellee's application and thereupon a stipulation was filed setting forth the fact that Bankrupt, as principal, and said insurance company, as surety, had executed and delivered to the City a bond wherein it was agreed that the aforesaid $45,000.00 should be repaid to the City upon its demand. The stipulation further set forth the payment to the City by said insurance company of the amount

of its claim and an assignment by the City to the insurance company of its rights, including its claim and the amended claim (R. 19). The Referee received the foregoing stipulation in evidence and thereupon the insurance company was made a party to the proceedings and is one of the petitioners herein (R. 21).

Ruling of the Courts Below.

On April 13, 1934, the Referee entered an order disallowing the claim of priority and directing that the claim should stand allowed as a general claim (R. 22).

Petition for review was filed and submitted to Hon. J. A. Donohoe, District Judge (R. 28). On October 8, 1934, a memorandum was filed by the District Judge in which he held that the claim was entitled to priority in the sum of $12,979.42 (R. 39).

On December 12, 1934, the District Judge, without notice, withdrew his memorandum of October 8th and filed a new memorandum allowing priority of only $628.63 (R. 40-57).

On December 17, 1934, judgment and decree was entered directing that the Referee's order disallowing priority be modified by allowing priority to the extent of $628.63 to be paid prior to the claim of general creditors and the balance to be allowed as a general claim (R. 59).

On April 27, 1935, the Circuit Court of Appeals modified the judgment of the District Court by disallowing any claim of priority (R. 114).

On May 25, 1935, a petition for rehearing was filed by petitioners (R. 125) which was denied on July 3, 1935 (R. 127).

Reasons Relied Upon for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals has decided an important question of federal law which has not been passed upon by the Supreme Court, in construing Section 64b (7) of the Bankruptcy Act to deny a municipal corporation the same right of priority as is given other corporations.

The construction of the Bankruptcy Act on the foregoing point has never been directly passed upon by the Supreme Court although a similar question was before the Supreme Court in the case of *Davis* v. *Pringle*, 268 U. S. 315, wherein the court held that the United States was not given priority under Section 64b as it existed prior to the 1926 amendment. The particular rule laid down has been abrogated by the 1926 amendment to the Bankruptcy Act.

2. The decision of the Circuit Court of Appeals in holding that no trust relation existed under the terms of a writing providing that a trust company "* * * holds for investment in trust, funds belonging to City * * *" has decided an important question of general law in a way untenable and in conflict with the weight of authority.

3. The decision of the Circuit Court of Appeals in holding that a trust ex maleficio did not result has decided an important question of general law in a way untenable and in conflict with the weight of authority.

4. The decision of the Circuit Court of Appeals in refusing to follow the construction by the Supreme Court of the Nebraska Constitution and statute relating to trust funds has decided a federal question and an important

question of general law in conflict with the weight of authority and with applicable decisions of the Supreme Court of United States.

The decision is contrary in principle to the rule announced by the Supreme Court of United States in *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, and *Marine Nat'l. Exch. Bank* v. *Kalt-Zimmers*, 293 U. S. 540, declaring that the federal court must adhere to the state court's construction of its law even though such law only purports to be declaratory of the common law.

For these reasons it is respectfully submitted that this petition should be granted.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY,
Petitioners,

By KARL W. KINDLEBERGER,
DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY, PETITIONERS,

V.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS.

The opinion of the Circuit Court of Appeals, Eighth Circuit, filed April 27, 1935, is reported in 77 Fed (2d) 425, and is in the record (R. 116).

II.

JURISDICTION.

Judgment of the Circuit Court of Appeals was entered April 27, 1935 (R. 114). Petition for rehearing was denied July 3, 1935 (R. 127). Jurisdiction of this court to issue the writ applied for, is invoked under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925 (C. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A., Sec. 347).

III.

STATEMENT OF THE CASE.

The statements of the matters involved, already given in the petition, pages 3 to 9, contain all that is material to the consideration of the questions presented.

Briefly summarized, the evidence shows that on September 26, 1928, the City of Lincoln, Nebraska, a municipal corporation, paid $45,000.00 to the Lincoln Trust Company, then engaged in a general trust company business, under the laws of Nebraska. The Trust Company upon receiving such money delivered to the City nine certificates for $5,000.00 each, the material parts of which are as follows:

> "THIS IS TO CERTIFY that the LINCOLN TRUST COMPANY of Lincoln, Nebraska, holds for investment in Trust, funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand & no/100 Dollars ($5,000.00) with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19——"

The Trust Company paid the City interest at 3 per cent up to March 26, 1932. The $45,000.00 was placed by the Trust Company in its general bank account. On June 14, 1932, the City demanded the principal and

accrued interest on the certificates, which was refused. Up to that time the lowest balance of cash in its general bank account was $7,875.97 and cash items of $5,193.45. On June 15, 1932, the Trust Company transferred from its general bank account $44,983.46 to its trust department, which it designated as "Segregated Assets Account" but no special items of liability were set up against that fund. The lowest balance in that account up to the closing of the Trust Company was $25,097.09 on the day it closed, which was turned over to the trustee in bankruptcy.

The City filed a general claim for $45,509.00 which it subsequently amended to claim priority. After the question of priority was submitted to the Referee the petitioner, Standard Accident Insurance Company as surety for the Trust Company, paid to the City the amount of its amended claim. The City's rights were then assigned to the insurance company, which was thereupon made a party to the proceedings.

The reasons relied on for the allowance of the writ show the errors intended to be urged and for brevity they are not repeated at this point.

IV.

SUMMARY OF ARGUMENT.

1.

The Circuit Court of Appeals erroneously construed Section 64 (b) of the Bankruptcy Act to deny a municipal corporation the same right of priority given to other corporations.

2.

The Circuit Court of Appeals erroneously holds no trust relation existed under the terms of the writing which provided that the Trust Company "* * * holds for investment in Trust, funds belonging to the City * * *."

3.

The Circuit Court of Appeals erroneously held that a trust ex maleficio did not result if a trust company received money as a deposit which it had no right to so receive.

4.

The Circuit Court of Appeals erroneously refused to follow the construction by the Supreme Court of Nebraska of the Nebraska Constitution and statute that trust funds may be recovered from an insolvent trustee upon proof that such funds augmented the assets in the hands of such trustee.

ARGUMENT.

1.

The Circuit Court of Appeals erroneously construed Section 64 (b) of the Bankruptcy Act to deny a municipal corporation the same right of priority given to other corporations.

Section (7) of 64 (b) of the Bankruptcy Act, as amended (11 U. S. C. A. Sec. 104b), provides:

> "The debts to have priority in advance of the payment of dividends to creditors and to be paid in full out of the bankrupt estates and the order of payment shall be * * * (7) debts owing to any person who by the laws of the states or the United States is entitled to priority: provided, that the term 'person'

as used in this section shall include corporations, the United States and the several states and territories of the United States."

The City claimed the right of priority accorded a sovereign at common law (see *Marshall* v. *N. Y.*, 254 U. S. 380-382), under the provisions of Section (7) of 64 (b) quoted above and Section 49-101, C. S. of Nebr. 1929, which provides:

> "**Common Law in Force.** So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within the state of Nebraska (R. S. p. 31; Ann. 6955; Comp. 1934; R. S. 1913, 3697; C. S. 1922, 3085)."

The Circuit Court of Appeals in recognizing this general right of the City to such priority says:

> "It is earnestly urged that by right of sovereignty, the City is entitled to priority in the payment of its claim. At common law, the Crown had a priority over all subjects for the payment of debts due it. In a receivership case arising in a state where the common law prevailed without statutory modification, and where the Supreme Court of the State had not theretofore passed upon the question, we held that such prerogative right inhered in a city as an agency of the state exercising a delegated sovereignty. *City and County of Denver* v. *Stenger*, (C. C. A. 8) 295 Fed. 809."

However, the Circuit Court of Appeals construes Section 64 (b) of the Bankruptcy Act, quoted above, to deny a municipal corporation the right of priority given to other corporations as well as persons. In discussing this question the opinion says:

"It is contended that this section of the bankruptcy act preserves the City's right as a sovereign to priority in payment of its debt in the provision that 'debts owing to any person who by the laws of the States or the United States is entitled to priority.' It is observed that the statute defines the scope to be given to the term 'person', it being provided that it shall include 'corporations, the United States and the several States and Territories of the United States.' It makes no mention of municipalities, counties, or other sub visions of the Government, and hence, we think they are necessarily excluded."

The Circuit Court of Appeals has either misconstrued or has failed to properly apply the principal announced in *Davis* v. *Pringle*, 268 U. S. 315, quoted in part in the opinion (R. 123), and further its construction of the bankruptcy act fails to give effect to the intent of Congress as expressed by the 1926 Amendment passed subsequent to the decision of *Davis* v. *Pringle*.

Justice Holmes denies priority to the United States because other parts of the Bankruptcy Act in giving it priority specifically mention it by name and he therefore concludes that the United States was not intended to be included in the word "person". On this point Justice Holmes says:

"It is incredible that after the conspicuous mention of the United States in the first place at the beginning of the section and the grant of a limited priority, Congress should have intended to smuggle in a general preference by muffled words at the end."

But a different situation exists as to a municipal corporation. It will be observed that in other parts of the Bankruptcy Act it treats a municipal corporation as in-

cluded within the general designation "corporation" and where it is desired to exclude municipal corporations it is mentioned as a specific exception to "corporations".

The corollary of the principle announced in *Davis* v. *Pringle, supra,* is that where in some instances a law specifically excepts a special class from a general class the use of the word describing the general class without the exception clearly shows an intention to treat the special class as covered by the words used to describe the general class. In other words, an examination of the entire Bankruptcy Act shows it intends to include municipal corporations within the designation "corporations" or "persons" unless specifically excepted. But as to the United States, it is not included in any other words and where covered by any provision, it is specifically mentioned.

The portions of the Bankruptcy Act excepting municipal corporations from the general designation "person" or "corporation", will be mentioned here for the convenience of the court.

Section 4a of the Bankruptcy Act, 11 U. S. C. A., Sec. 22:

> "Any **person** except a **municipal,** railroad, insurance, or banking **corporation** shall be entitled to the benefits of this title as a voluntary bankrupt."

Section 4b of the Bankruptcy Act, 11 U. S. C. A., Sec. 22:

> "* * * **any moneyed, business or commercial** corporation, **except a municipal,** railroad, insurance, or banking **corporation** * * *."

Section 64a of the Bankruptcy Act, 11 U. S. C. A., Sec. 104a:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality, * * *."

The use of the word "municipality" in the section just quoted does not militate against the argument heretofore made. It is obvious that the word "corporation" would be inappropriate to use in this part of the law because taxes are not payable to corporations generally, but only to governmental agencies, which it will be observed are specifically described.

We submit that the rule announced in *Davis* v. *Pringle,* is not applicable to exclude municipal corporations in view of the specific provisions of the Bankruptcy Act and that municipal corporations either as "persons" or as "corporations" were given priority in the law before the 1926 amendment.

That amendment strengthens this construction. It shows the intention to have the word "person" include not only the United States but also the states, territories and corporations generally. The purpose is manifest to include within the word "person" substantially every class of creditor. Certainly a municipal corporation was included because not excepted from the general word "corporation" as is done elsewhere in the Act. A municipality is a mere subdivision agency, or part of the state. The intention to include states within the term persons is clearly expressed and a forced and unnatural construction must be placed upon the act to exclude parts thereof where no logical ground for distinction exists.

Our contention as to the intent and construction of the 1926 amendment is supported by James Angell McLaughlin's article in the Harvard Law Review, Volume 40, pages 345 and 346. In discussing the amendment he says:

"The rule of *Davis* v. *Pringle* is reversed, and the United States and the states are expressly declared to be 'persons' which may have priority in bankruptcy on claims other than taxes in accordance with other federal or state laws. Such priority remains of a deferred class—that immediately preceding the claims of creditors to dividends.

"It has been pointed out that litigation may arise by reason of the fact that it is not expressly declared that counties, districts or municipalities are entitled to such priority on claims other than taxes. This is in contrast to the language of Section 64 (a) which specifies that taxes owing to 'the United States, state, county, district or municipality' shall have the next preceding degree of priority. The argument will be made that such governmental units are by implication denied priority on other than tax claims even when it is granted them by state law. **As applied to municipal corporations such an argument should not prevail.** *Davis* v. *Pringle* was a case of priority claimed by the United States. The argument for the government upon the act as it stood was this. Section 64 (b) gives persons priority in accordance with the laws of the United States. The United States is a corporation, a corporation is a person as defined in Section 1 (19), and is entitled to priority by reason of Section 3466 of the Revised Statutes. The Supreme Court thought that Congress would, if it intended the United States to have the claimed priority in bankruptcy, have provided for it by direct expression instead of through such a 'logical concatenation.' Shortly before the Act of 1926, the decision had been interpreted to exclude a state from priority provided by the state law. **The amendment in repudiating *Davis* v. *Pringle* as applied both to its own facts and to state priorities would seem to be a repudiation of the reasoning on which that case is based. A municipal corporation is clearly a person within the Bankruptcy Act not only because the definition of a person covers it, but**

> **because it is expressly referred to as a person in Section 4 (a). Furthermore there is less reason to apply the rule of *Davis* v. *Pringle* to a state or a municipal corporation than to the United States.** If Congress meant the United States to have a priority, it could easily have said so. There has never been even a suggestion that Congress should set up a priority for states or municipalities that the states would not claim for themselves or establish for the benefit of their municipalities. **With reference to these, the natural thing was simply to allow them to be covered by a general clause recognizing priorities established by state law."**

The reasoning in the foregoing article by Professor McLaughlin of the Harvard Law School is logical and the construction which he places on this amendment, if followed, would give the City the priority of a sovereign to which it is entitled under the laws of Nebraska.

2.

The Circuit Court of Appeals erroneously holds no trust relation existed under the terms of the writing which provided that the Trust Company "holds for investment in trust, funds belonging to the City."

The certificate delivered by the Trust Company to the City is set forth in full at page 3 hereof. In substance it states that the Trust Company "* * * holds for investment in trust, funds belonging to City * * *" amounting to $45,000.00 "with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19____ This Trust Certificate bears no per cent interest after maturity."

The Circuit Court of Appeals' opinion holds no trust relation existed under this writing, principally because

the payment of interest by the Trust Company to the City indicated the funds were to become the property of the Trust Company and because such funds were to be repaid by the Trust Company in cash. The decision on this important question of general law is probably untenable and in conflict with the weight of authority.

In the first place, the writing itself shows the parties contemplated a trust relation. It states the Trust Company "holds for investment in Trust, funds belonging to City." Every word just quoted implies the funds were to remain the City's property and simply to be held in trust for the City. Words could hardly be more conclusive in their meaning. Furthermore, the intention of the parties at the time the payment was made controls. See *Northern Sugar Corp.* v. *Thompson,* 13 Fed. (2d) 829 (C. C. A. 8), and *Keyes* v. *Paducah & I. R. Co.,* 61 Fed. (2d) 611 (C. C. A. 6).

It is true payment of interest may ordinarily imply a loan, but is not conclusive that a loan was made. In the case of *In re Newark Shoe Stores,* 3 Fed. Supp. 293 (Md.), deposits were made by store managers as a condition precedent to their employment and the store agreed to pay interest thereon annually. The store mingled the funds with its own funds and never kept a separate account thereof. Upon the bankruptcy of the store the managers claimed their funds were held in trust and the court upheld their contention. In discussing the question of the payment of interest it is said in the opinion:

> "First, with respect to whether the deposit of the guaranty fund created a trust or something in the nature of a trust, it is too well settled to require citation of authorities that there can be no trust if there is no intention to create one, and, further, the fact that interest at a fixed rate is stipulated to be paid upon a deposit is prima facie, **but not neces-**

> sarily, **conclusive evidence** that the transaction is a loan, namely, that the relationship of debtor and creditor, and not that of trustee and cestuis que trust, is created."

It is significant that there is not a single word in the agreement of the parties in the foregoing case indicating a trust relation was intended. In the present case the agreement entered into between the City and Trust Company, whose very business was to act as a fiduciary, expressly stated that the Trust Company "holds for investment in Trust, funds belonging to City". No words could make it plainer that the parties intended to create a trust and it is a fundamental rule that where there is a written agreement, it is always the best evidence of the intention of the parties.

In the recent case of *In re Whitty*, 175 Atl. 871 (Pa.), the record shows a trust company received funds for investment and guaranteed a return of 5 per cent interest thereon, the excess to be retained by the trust company. The agreement was recognized as an enforceable trust.

In *Gerard* v. *Bank of N. Y.*, 240 App. Div. 531, 270 N. Y. S. 835, an agreement called a "Trust of Accumulation" acknowledged the receipt of funds to be held in trust, the trust company agreeing to pay compound interest at the rate of 5 per cent per annum. The agreement was recognized as an enforceable trust.

In the case of *In re Roberts*, 175 Atl. 869 (Pa.), the trust company received cash in trust and agreed to invest it in legal investments but also agreed to repay the principal of the trust **in cash** upon thirty days' notice. It was held the agreement was a valid trust and required the repayment of the trust principal in cash.

The cases just cited indicate that the agreement to pay interest does not show conclusively that no trust agreement was created and likewise that the promise to repay the principal in cash does not necessarily show that no trust relation existed. It would seem that the intention of the parties to create a trust relation, as clearly shown by the writing, should control.

The case of *City Council of Charleston* v. *Elliott*, 73 Fed. (2d) 920 (C. C. A. 4), cited in the opinion does not support the holding that no trust relation existed. In that case it is stated there was nothing to show: "* * * that the bank should handle them as trust funds held by it as a fiduciary." In that case there was merely a deposit in a commercial bank, whereas in the present case there is a specific agreement that the funds are held by a trust company in trust.

The statement is made in the opinion (R. 121) as follows:

> "Even though the money was paid with the thought of a possible future investment, this special purpose does not in itself give rise to a trust relation."

Several cases are cited in support of the above quotation, but it is significant that the rule stated in each of these cases actually supports the contention of the petitioners that a trust relationship exists in this case. We call attention particularly to the first case cited of *Blakey* v. *Brinson*, 286 U. S. 254, 76 L. Ed. 1089, where it is said in the opinion, on page 262:

> "* * * if the respondent had handed the money back to the bank **under a specific agreement between him and the bank that the money was to be held as a special fund, * * * such a procedure, if actually carried out, might afford a**

> **basis,** which is lacking here, for the inference **that respondent,** no longer content with the role of creditor, **had sought to establish a trust fund."**

In the present case the City did pay money to the Trust Company "under a specific agreement * * * that the money was to be held as a special fund" for the purpose of investment and this, under the quotation above, would infer the establishment of a trust fund.

3.

The Circuit Court of Appeals erroneously held that the receipt of the City's funds by the Trust Company, although not as an express trust, was nevertheless rightful and that consequently a trust ex maleficio did not result in favor of the City of Lincoln.

If a trust relation did not arise from the agreement of the parties, then we contend a trust ex malificio resulted and that the decision of the Circuit Court of Appeals in refusing to so hold, decided an important question of general law in a way untenable and in conflict with the weight of authority.

The Circuit Court of Appeals in holding to the contrary based its decision on two reasons. The first is that the City of Lincoln, due to its participation in making the deposit was prevented from raising any question regarding the illegal nature of the arrangements made in that it did not come before the court with clean hands. This is set out in the opinion (R. 122) as follows:

> "It (the city) is hardly in position to come into a court of equity repudiating or casting aspersions upon the transaction. It must come into court with clean hands."

The opinion places an unjustified construction on the evidence. There is nothing to indicate that the City did not come into court with "clean hands". It paid the Trust Company its money and received a writing which on its face indicated clearly an intention of the parties that the funds should be held in trust. It still claims that the funds are held in trust under its agreement, but in addition it claims that if the agreement does not create a trust relation, then the court should find that a trust resulted from the transaction in favor of the public.

The court has overlooked the fact that the wrongful acts, if an express trust was not created, were committed by the Bankrupt in receiving the fund illegally and by the city treasurer and that the public is not bound thereby. To hold that a public body is estopped from raising the question of illegality, due to its participation in the arrangement for the deposit merely to the extent that its funds are used by its treasurer in making the deposit, would in every case of a claim of the nature asserted herein, result in a denial of the relief asked. Authority to the contrary is overwhelming. It is universally conceded that the illegal or wrongful deposit of public funds gives rise to a trust ex malificio. This rule is stated in the annotation in 51 A. L. R., at page 1342, as follows:

> "It is a principle supported by numerous authorities that the unauthorized or unlawful deposit of public funds in a bank which subsequently becomes insolvent creates a trust relationship in such funds between the bank and the community to which they belong. It is obvious that to hold otherwise in such cases would leave an open door to fraud, and would allow the interests of the public to be jeopardized by the wrongful act of a trusted officer."

Both United States and Nebraska cases are cited in support of this rule.

In every case where courts have held that a trust ex malificio resulted in favor of a public body, that body has participated in the arrangements for the deposit to at least the extent that the City of Lincoln participated in this case, namely, that public funds were used in making the deposit. And in many cases the participation has been greater, due to the fact that the governing authorities of the public bodies gave directions to the depositing officer which in some manner did not comply with the applicable law. The well established rule of law that a municipal corporation is not estopped by the acts of its officers from asserting the illegality of a transaction is applicable to the present case in view of which we submit that there can be no serious question of the right of the City of Lincoln to show that if the agreement did not create a trust relationship, any other construction placed thereon, would result in an illegal transfer of the City's funds, and consequently give rise to a trust ex maleficio.

The more important question is whether under all the circumstances of this case the deposit of the City's funds was illegal if a trust was not expressly created. The Circuit Court of Appeals only briefly considers the question in view of its holding that the City is estopped from raising the question. The second reason for the disallowance of the claim is stated (R. 121) as follows:

> "But it is urged by the appellant Insurance Company that if the money was paid to the Trust Company as a deposit then it became a trustee ex maleficio, because, it had no right to accept deposits. The Trust Company in this transaction was not in the banking sense of the word receiving deposits, but we are of the view that the transaction resulted in the creation of the relation of debtor or creditor."

We believe it is conceded that if the City's money was accepted by the Trust Company as a deposit, that its acceptance thereof was illegal, in view of the limitations placed upon its power, under the statute under which its charter was granted (Secs. 8-201 to 8-221, C. S. of Neb. 1929). A trust company so organized in Nebraska has no authority to transact a banking business. The powers thereof were considered and the statute above cited construed in the case of *Gamble* v. *Daniel*, 39 Fed. (2d) 447 (C. C. A. 8), and it was there held that a trust company so chartered has authority to accept deposits only "to conduct safety deposit vaults and to act as a depository for money in court." The evidence is undisputed in this case that the City's money was not received by the Trust Company for either of these purposes. It seems obvious therefore that if it was accepted as a deposit in any other sense that the transaction was unlawful.

It becomes necessary then to examine the transaction to determine what possible construction can be placed thereon other than that the money was received in trust. These possibilities are limited only by the possible legal consequences arising when one individual pays or delivers money to another.

However, any relationship created will fall into either of two classes, the first in which title to the fund delivered passes and the second in which the title to the fund or its proceeds is retained by the transferor. Any construction placing the particular transaction in the second class will result in the allowance of the City's claim and since we only contend that a trust was created it is unnecessary to further discuss these possibilities.

We submit that the only reasonable interpretations to the effect that the transaction falls into the first class are

that the acts constitute an attempt on the part of the Bankrupt and the city treasurer to create a bank deposit or an attempt by the Bankrupt to borrow public funds for its private use from the city treasurer. In either case the relationship attempted would be that of debtor-creditor and the Circuit Court of Appeals in stating that this was the result of the transaction made no answer to the City's contention that the transaction was illegal. It merely points out the general class of relationships into which, bank-depositor, lender-lendee relationships fall.

It is true that the relationship of debtor or creditor between the Bankrupt and City might have arisen under certain legal circumstances, but this does not justify the court in finding that all circumstances giving rise to a debtor-creditor relationship between these parties would be legal circumstances from which no other consequences except those normal to the relationship would flow. But if the statement of the Circuit Court of Appeals is to be taken as a reason this meaning must be given to it.

We submit that if the certificates do not evidence an intent that the fund should be held in trust, that they evidence an intent to create a debtor-creditor relationship, unlawful and illegal in its nature and that consequently the court should not permit the normal consequences to follow, but should under general principles impress the fund with a trust ex malificio.

If these certificates, due to an apparent repugnacy in their provisions, do not create an express trust, the most reasonable construction of the debtor-creditor class is that they were certificates of deposit payable on demand and of the same nature as commonly used in banking transactions as distinct from certificates of deposits covering bailment or other business transactions. The similarities between the instruments in question and an ordi-

nary bank certificate of deposit are so apparent that enumeration thereof is unnecessary. If "hold for investment in trust, funds of" is not given any meaning, then these instruments are identical with an ordinary bank certificate of deposit which merely certifies that a named individual has on deposit with the issuing bank a sum certain payable on demand or otherwise.

While it is possible as pointed out above that the certificate may show an intent on the part of the treasurer to loan funds of the City to the Lincoln Trust Company, that is to loan public funds for private use, we submit that such an interpretation is unnatural, for with the exception that the certificates are in a definite amount, are dated, and contain a provision for the payment of interest, these certificates have none of the characteristics of promissory notes. The particular characteristics are common to many ordinary business contracts, but the certificates do not contain the one most essential characteristic of a promissory note, namely, an express promise to pay a sum certain in money. The promise in the certificate must be implied, as it is implied in many certificate of deposit forms, but not in note forms. If there was an intent to create a lender-lendee relationship how much easier it would have been to evidence such an intent by the use of ordinary note forms, undoubtedly in the possession of the Trust Company since it was in a business making the use of ordinary note forms a common occurrence.

There is nothing in the record explaining the actual intent of the Lincoln Trust Company in drafting the form on which the agreement between the treasurer and Trust Company was inserted. If that intent was other than to evidence a trust fund held by the Trust Company, knowing that its officials were aware of the limitation of

its powers under the statute under which its charter was granted, we must presume that they intended to create an ambiguous instrument by the use of which the company could enjoy the use of customers' money as an ordinary bank in spite of the statutory restrictions and at the same time show some semblance of complying with its charter powers. To the person from whom it was soliciting deposits it could say as an inducement that your money is payable at any time with interest as an ordinary bank account. To the banking commissioner or other proper parties interested the compliance with the law by institutions under supervision, the clause reciting "hold in trust" could be pointed out as an argument in support of the view that no deposits had been solicited or accepted.

We submit in view of the admitted limitation on the power of the Trust Company under Nebraska law construed in *Gamble* v. *Daniel, supra,* prohibiting it from accepting deposits, or doing a general banking business, that the transaction if not giving rise to an express trust, was illegal and the general rule above cited is applicable and that the funds deposited by the city treasurer were held by the Trust Company as trustee ex maleficio.

4.

The Circuit Court of Appeals erroneously refused to follow the construction by the Supreme Court of Nebraska of the Nebraska constitution and statute that trust funds may be recovered from an insolvent trustee upon proof that such funds augmented the assets in the hands of such trustee.

If, as we contend, a trust relation existed, then the Circuit Court of Appeals should have followed the construction of the Supreme Court of Nebraska of its Con-

stitution and statute that a cestui que trust is entitled to priority in payment from the assets of an insolvent trustee upon proof that such funds augmented such general assets.

We are concerned with the order of payment of debts of an insolvent bankrupt trust company under Section 64b of the Bankruptcy Act, which provides in Section (7) for the same priorities as exist under a state law. The bankrupt in this case was incorporated under the laws of Nebraska and in the absence of bankruptcy proceedings would be liquidated under the Nebraska laws and therefore such laws should be followed on the question of priorities. No one would seriously question the right of the City to priority under Section 64b of the Bankruptcy Act if a Nebraska statute specifically provided that a cestui que trust whose funds were mingled with and augmented the trustee's assets should be paid from the Bankrupt's assets ahead of general creditors. Such a right of priority will now be shown to exist under the Constitution and statutes of Nebraska as construed by its courts.

Section 9 of Article V of the Constitution of Nebraska, provides:

> "The district courts shall have both chancery and common law jurisdiction and such other jurisdiction as the legislature may provide; * * *."

Section 49-101 of the Compiled Statutes of Nebraska for 1929 provides:

> "**Common Law in Force.** So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state,

is adopted and declared to be law within the state of Nebraska (R. S. p. 31; Ann. 6955; Comp. 1934; R. S. 1913, 3697; C. S. 1922, 3085)."

In *Bloomfield State Bank* v. *Miller*, 55 Neb. 243, 75 N. W. 569, it is held that the statutory provision adopting the common law of England includes the law derived from the English courts of chancery.

In passing upon the distribution of assets of an insolvent trustee the Supreme Court of Nebraska has held that the Constitution of Nebraska conferred equity jurisdiction which cannot be limited by the legislature and under the equity rule which comes from the chancery practice it is only necessary to prove that the trust property augmented the assets. See *State* v. *Farmers State Bank of Polk*, 121 Neb. 532, 237 N. W. 857.

We emphasize the statement of the Supreme Court of Nebraska in the case last cited that "the rule formulated under equity power conferred by the Constitution of Nebraska and state legislation" entitled a cestui que trust to priority against the assets in the hands of a trustee upon proof that such assets have been augmented by the trust funds. **This rule has been consistently adhered to in subsequent decisions.** See *State* v. *Bank of Otoe*, 125 Neb. 383, 250 N. W. 254; *State* v. *Dwight State Bank*, 126 Neb. 687, 253 N. W. 410. This rule is not limited to banks but applies to trusts generally. See *Federal Trust Co.* v. *Baxter*, 128 Neb. —, 257 N. W. 368.

Inasmuch as it is shown without dispute that the City's money augmented the assets of the Bankrupt, "the rule formulated under equity power conferred by the Constitution of Nebraska and state legislation," as announced by its highest court, entitles the City to priority in payment from the assets now in the hands of the trustee.

Under Section 64b (7) of the Bankruptcy Act, heretofore quoted, this court should follow the decisions of the state court in allowing the City the same priority it would have received under the Nebraska Constitution and statute.

The Circuit Court of Appeals of the Eighth Circuit has recognized the applicability of the foregoing rule in *Wheeler* v. *Johnson*, 26 Fed. (2d) 455 (C. C. A. 8).

Under the express provisions of Section 64b of the Bankruptcy Act and the holding of the foregoing case, the court should have followed the construction placed by the Nebraska court on its constitution and statute and allow full priority to petitioners' claim.

But even if priority is not allowed under Section 64b it should be granted to the extent such funds passed into the hands of the trustee in bankruptcy under the ordinary equitable principles for administering trust funds as determined by the Nebraska courts based on its constitution and statute in the cases previously cited under this heading.

"The rule formulated under equity power conferred by the Constitution of Nebraska and state legislation" as announced in *State* v. *Farmers State Bank of Polk*, *supra*, entitles a cestui que trust to priority in payment of its claim upon proof that the assets in the hands of the trustee were augmented by the trust funds. All of the decisions there referred to, recognize that the title to the funds of the cestui que trust, even though mingled with other funds, does not pass to the trustee in bankruptcy but remains the property of the cestui que trust. Notwithstanding the fact that it is impossible to prove that any part thereof passed into the possession of the

trustee in bankruptcy, it becomes a charge on the property for the amount such funds augmented the assets which passed to the trustee in bankruptcy. In some instances it has been recognized as a lien on the property but whether considered as a charge or a lien the rule is definitely established in Nebraska that the cestui que trust is entitled to be paid from the assets before the general creditors. Even if it does not entitle the City to priority under Section 64b of the Bankruptcy Act it does establish a rule of equity in Nebraska for the administration of trust funds based on its constitution and statute which should be followed by this court.

The District Court in its last memorandum cites *Mandel* v. *Burton*, 292 Fed. 127 (C. C. A. 8), as holding that the state rule relating to trust funds will not be followed in bankruptcy proceedings. In that case the court says at page 129:

> "Appellants present their theory of following the fund as a trust fund under the Missouri decisions. The question does not involve any **rule of property** or the **construction** of **a state statute,** but merely a **principle of equity.** Hence the federal decisions must govern."

However, the foregoing case does not hold against our contention, but in effect supports our position. It holds the federal decisions must govern because the construction of a state statute is NOT involved. The corrollary would be that if the construction of a state statute IS involved then state decisions must govern. That is exactly the question presented in the case now before the court. Shall this court follow the construction placed on the Nebraska Constitution and statute by its court? If it does, then the City is entitled to priority for the full amount of its claim.

In the recent case of *Burns Mortg. Co.* v. *Fried*, 292 U. S. 487, it was held that the federal court must adhere to the state court's construction of a law even though such law only purports to be declaratory of the common law.

In *Marine National Exchange Bank* v. *Kalt-Zimmers*, 293 U. S. 540, the same rule is followed in bankruptcy proceedings. In the opinion the court says:

> "An identical provision was considered by the Supreme Court of Wisconsin in *Pollard* v. *Tobin*, 211 Wis. 405, 247 N. W. 453. The ruling of the court was that negotiability was not impaired. (Cases cited.) * * * This construction of a Wisconsin statute is binding upon the national courts, though the statute may have intended to be declaratory of the rule at common law. *Burns Mortg. Co.* v. *Fried*, 292 U. S. 487, 78 L. Ed. 1380, 54 S. Ct. 812, 92 A. L. R. 1193."

It would seem that the rule announced in the foregoing cases should be applicable whether the state court construes a statute declaratory of the common law or whether the state court construes a statute adopting the common law. There is no difference in principle whether a statute declares the common law rule as to recovering trust funds and the court then construes the rule thus announced or whether the statute adopts the common law and the court then construes the common law thus adopted to include a rule for the administration of trust funds.

We respectfully submit that the construction placed on the common law rule formulated under the power conferred on its courts by the Nebraska Constitution and

the construction placed on the common law rule adopted by the Nebraska statute should have been followed by the Circuit Court of Appeals.

CONCLUSION.

The questions involved in this case are of far reaching importance. One obvious effect of the decision is to place a narrow and unjustified construction on the Bankruptcy Act in denying a municipal corporation the same priority as any other corporation would be entitled to receive. Furthermore, the duty of the federal courts to follow the rule formulated under the constitution and statutes of a state relating to trust funds should be definitely established by a decision of this court.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY,
Petitioners,

By KARL W. KINDLEBERGER,
DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONERS,
V.
L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT,
RESPONDENT.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

KARL W. KINDLEBERGER,
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The filing of this reply brief is necessary in order to correct certain statements made in respondent's brief.

I.

SUMMARY OF ARGUMENT.

1.

The right of a sovereign to priority in the payment of its claim exists in Nebraska.

2.

An opinion of the Nebraska Supreme Court Commission is not entitled to consideration because of an express statutory provision.

3.

The right to priority has not been waived.

II.

ARGUMENT.

1.

RIGHT OF SOVEREIGN TO PRIORITY DOES EXIST IN NEBRASKA.

Respondent states on page 10 of his brief that the right of a sovereign to priority "is not in force in the State of Nebraska". We challenge the correctness of this statement.

Section 49-101, C. S. of Nebr. 1929, quoted on page 14 of our original brief herein, adopts the common law of England as the law of Nebraska.

In *City of Denver* v. *Stenger*, 295 Fed. 809 (C. C. A. 8), it was held that under a Colorado statute in almost the same language a sovereign right of priority was adopted and that a city, as an agency of the state, acquired

such right of priority. In the present case the Circuit Court of Appeals did not disapprove of the rule announced in *Denver* v. *Stenger, supra,* but refused to apply it because of its holding that a municipal corporation was not entitled to the same priority given to other corporations by the Bankruptcy Act. It has been our contention at all times that the rule announced in *Denver* v. *Stenger, supra,* is controlling in this case and should have been applied. The fact that a Colorado state court subsequently placed a different construction on the Colorado statute would not change the rule announced by the Circuit Court of Appeals as applied to a similar Nebraska statute.

2.

OPINION OF THE NEBRASKA SUPREME COURT COMMISSION IS NOT ENTITLED TO CONSIDERATION BECAUSE OF AN EXPRESS STATUTORY PROVISION.

In support of the statement that the right of a sovereign to priority is not recognized in Nebraska respondent, on page 11, cites an unreported opinion of the Supreme Court Commission of Nebraska. This opinion is not support for respondent's statement for two reasons: In the first place, a decision by the Supreme Court Commission does not establish any precedent. Section 27-224, C. S. of Nebr. 1929, specifically provides with reference to such decisions:

> "Such proceedings shall not be published in the reports of the court or in any other reports, and shall establish no precedent and be authority only in that particular case."

In the very recent case of *McIntosh* v. *Standard Oil Co.*, 121 Neb. 92, 236 N. W. 152, the Supreme Court

of Nebraska refused to consider a Commissioner's opinion which had been cited to it and said:

> "As to the case of *Lincoln Drug Co.* v. *Davidson*, No. 24836, on which the defendant relies, it may be said that **this court can give no consideration whatever to the latter in the instant case. It is a commission opinion.**"

(1) The statement on page 11 of respondent's brief that "the decisions of the Commission * * * are usually considered as law of the state until such time as expressly overruled by the court itself" is unsupported by any authority and is directly contrary to the statutory provision quoted and the holding in *McIntosh* v. *Standard Oil Company, supra.*

Furthermore, we do not believe the construction placed on this opinion by respondent is correct. As a matter of fact, the opinion specifically says that the authorities cited to sustain the sovereign right of priority "are convincing." The Commissioner did not apply the rule because the Nebraska law provided a complete plan for winding up the affairs of the bank involved. This is exactly what was held in the case of *Fiman* v. *State of South Dakota*, 29 Fed. (2d) 776 (C. C. A. 8), certiorari denied, 279 U. S. 841. (2) Such laws do not contain a provision as the Bankruptcy Act does giving the same priority that existed under the laws of a state.

Respondent, on page 11 of his brief, quotes from the opinion in *Re P. J. Potter's Sons*, 143 Fed. 407 (D. C. Ky.), holding that priority must be evidenced by statutory provision or judicial rule. Of course, in our case a statutory rule is involved, namely, the statute of Nebraska making the common law a part of its law and therefore under *Denver* v. *Stenger*, 295 Fed. 809 (C. C.

A. 8), heretofore cited, the common law right of priority of a sovereign became a part of the Nebraska law. Respondent failed to call the court's attention to the fact that the case of P. J. Potter's Sons was reversed by the Circuit Court of Appeals and a priority allowed. See *Smith* v. *Mottley,* 150 Fed. 266 (C. C. A. 6).

3.

RIGHT TO PRIORITY HAS NOT BEEN WAIVED.

Respondent, on page 12, claims that priority has been waived by failure to assert it prior to adjudication in bankruptcy and at the bottom of page 4 states that the amended claim contains no allegation of a trust ex maleficio or for priority under Section 64b (7) of the Bankruptcy Act. The record does not disclose that respondent has heretofore raised any question of such a waiver although the right to priority as a sovereign and as a trust was asserted, considered and passed upon by the referee (R. 22, 26), the District Court (R. 39; 43) and the Circuit Court of Appeals (R. 114, 122). Under such circumstances the question of a waiver could not be properly raised in this court. But even if it were considered it is without merit.

None of the authorities cited by respondent support his statement that the right to priority under Section 64b of the Bankruptcy Act is lost if not asserted before bankruptcy. Obviously such a rule would be unjust, harsh and impractical and would frequently deprive a creditor of priority given by the Bankruptcy Act. See *Lott* v. *Salsbury,* 237 Fed. 191 (C. C. A. 4).

As a matter of fact the right to priority need not be asserted until the trustee is ready to pay dividends to creditors. See

In re Worcester County, 102 Fed. 808, 813 (C. C. A. 1).

In re Jones, 151 Fed. 108, 110.

In the recent case of *State of Oregon* v. *Ingram,* 63 Fed. (2d) 417, 420 (C. C. A. 9), certiorari denied, 290 U. S. 630, the court specifically passed upon this question and held that the right of a sovereign to priority was not waived because not asserted until after bankruptcy. See also:

Commonwealth of Pennsylvania v. *Stocker,* 70 Fed. (2d) 453, 454 (C. C. A. 3).

CONCLUSION.

We respectfully submit that a writ of certiorari should be granted for the reasons stated in the petition therefor as amplified by petitioners' briefs.

Respectfully submitted,

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IN THE

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UNITED STATES

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY, PETITIONERS,

V.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT, RESPONDENT.

BRIEF FOR THE PETITIONERS.

KARL W. KINDLEBERGER,
DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

OPINIONS.

The opinion of the Circuit Court of Appeals, Eighth Circuit, filed April 27, 1935, is reported in 77 Fed. (2d) 425, and is in the record (R. 116).

JURISDICTION.

The case is before the court upon a writ of certiorari granted on October 14, 1935, under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925 (C. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A., Sec. 347). The order granting certiorari was limited to the question of the application of Section 64 (b) of the Bankruptcy Act.

STATEMENT OF THE CASE.

This appeal involves the right to priority in the payment of a $45,509.00 claim of the City of Lincoln, Nebraska, against the Lincoln Trust Company, Bankrupt. Priority was denied by the Circuit Court of Appeals on the ground that a debt due a municipal corporation was not within the provisions of Section 64 (b), Subdivision (7) of the Bankruptcy Act allowing priority to debts owing any person who is entitled to priority by the law of any state (R. 116). The facts material to this appeal are not disputed.

Briefly summarized, the evidence shows that on September 26, 1928, the City of Lincoln, Nebraska, a municipal corporation, paid $45,000.00 to the Lincoln Trust Company, then engaged in a general trust company business, under the laws of Nebraska. The Trust Company upon receiving such money delivered to the City nine certificates for $5,000.00 each, the material parts of which are as follows (R. 68):

> "THIS IS TO CERTIFY that the LINCOLN TRUST COMPANY of Lincoln, Nebraska, holds for investment in Trust, funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thou-

sand & no/100 Dollars ($5,000.00) with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19_____"

The Trust Company paid the City interest at 3 per cent up to March 26, 1932 (R. 69). On June 14, 1932, the City demanded the principal and accrued interest on the certificates, which was refused. On July 9, 1932, the Trust Company was adjudicated a bankrupt (R. 58).

The City filed a general claim for $45,509.00 which it subsequently amended to claim priority. After the question of priority was submitted to the Referee the petitioner, Standard Accident Insurance Company, as surety for the Trust Company, paid to the City the amount of its amended claim. The City's rights were then assigned to the insurance company, which was thereupon made a party to the proceedings (R. 58).

RULINGS OF THE COURTS BELOW.

On April 13, 1934, the Referee entered an order disallowing the claim of priority and directing that the claim should stand allowed as a general claim (R. 22).

Petition for review was filed and submitted to Hon. J. A. Donohoe, District Judge (R. 28). On October 8, 1934, a memorandum was filed by the District Judge in which he held that the claim was entitled to priority in the sum of $12,979.42 (R. 39).

On December 12, 1934, the District Judge, without notice, withdrew his memorandum of October 8th and filed a new memorandum allowing priority of only $628.63 (R. 40-57).

On December 17, 1934, judgment and decree was entered directing that the Referee's order disallowing priority be modified by allowing priority to the extent of $628.63 to be paid prior to the claim of general creditors and the balance to be allowed as a general claim (R. 59).

On April 27, 1935, the Circuit Court of Appeals modified the judgment of the District Court by disallowing any claim of priority (R. 114).

On May 25, 1935, a petition for rehearing was filed by petitioners (R. 125) which was denied on July 3, 1935 (R. 127).

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erroneously held that Section 64 (b) of the Bankruptcy Act did not apply to a municipal corporation and thus denied such a corporation even the same right of priority given to other corporations and persons.

2. The Circuit Court of Appeals erroneously held that Section 64 (b) of the Bankruptcy Act did not apply to a municipal corporation and thus denied such a corporation the common law right of priority accorded a sovereign which has been adopted by the statutes of Nebraska.

3. The Circuit Court of Appeals erroneously held no trust relation existed under the terms of a writing providing that a trust company "* * * holds for investment in trust, funds belonging to City * * *."

4. The Circuit Court of Appeals erroneously held that a trust ex maleficio did not result in favor of the City.

5. The Circuit Court of Appeals erroneously refused to follow the construction by the Supreme Court of Nebraska of the Nebraska Constitution and statute that trust funds may be recovered from an insolvent trustee upon proof that such funds augmented the assets in the hands of such trustee.

SUMMARY OF ARGUMENT.

1. Section 64 (b) of the Bankruptcy Act giving priority to payment of debts entitled to priority under the laws of the state or of the United States applies to a municipal corporation, but was erroneously construed by the Circuit Court of Appeals to exclude such a corporation from any priority whatever.

2. Section 64 (b) of the Bankruptcy Act applies and under it a municipal corporation is entitled to the common law right of priority accorded a sovereign which has been adopted by the statutes of Nebraska.

ARGUMENT.

Introduction.

Section 64 (b) of the Bankruptcy Act, as amended (44 Stat. 666, 11 U. S. C. A., Sec. 104 (b) provides:

> "The debts to have priority in advance of the payment of dividends to creditors and to be paid in full out of bankrupt estates and the order of payment shall be * * * (7) debts owing to any person who by the laws of the states or the United States is entitled to priority; provided, that the term 'person' as used in this section shall include corporations, the United States and the several states and territories of the United States."

Relying on the portion of Section 64 (b) just quoted, petitioners contend, and have contended throughout this proceeding, that the City was entitled in bankruptcy proceedings, to assert any right of priority of payment of its claim, given to it under applicable Nebraska law. And petitioners contend and have contended that under Nebraska law the City was entitled to priority of payment of its claim on two grounds, the first being that under Nebraska law a cestui que trust, contrary to the more general rule, is entitled to priority of payment out of the assets of the estate of an insolvent trustee upon a showing that the trustee's estate was augmented by the property of the cestui. Numerous Nebraska cases sustain this doctrine.

The second ground asserted is that under Nebraska law the City has the same right as a sovereign to priority of payment of its claims as existed under the common law which has been adopted by statute in Nebraska. This question is discussed more in detail at pages 25-30 hereof.

The Supreme Court in granting the writ in this case limited the scope of the review to the application of Section 64 (b) of the Bankruptcy Act. Broadly this could be interpreted to include not only the question of the construction of the applicable section of the Bankruptcy Act with regard to the question of whether a municipality was included within the meaning of Section 64 (b), but also the question of whether or not under the applicable Nebraska law the City is entitled to priority of payment. Viewed more literally the order of this court may be taken to limit the scope of the review to the question of construction of Section 64 (b) of the act and after considerable doubt the brief herewith submitted is based upon this latter assumption.

If a final determination of this cause is to be made by this court upon the question to which the review is thus limited, then we presume that the findings of the Circuit Court of Appeals on the question of local law will be deemed final. On the first point the Circuit Court of Appeals found that there was no trust relationship between the City and the Lincoln Trust Company. While it is and has been contended that this finding is erroneous, for present purposes it must be assumed that regardless of the finding of this court on the particular question considered, no rights can be asserted or based on the claim that there existed a trust relationship.

The Circuit Court of Appeals disposed of the second ground for priority asserted by petitioner on the broader question of the construction of the Bankruptcy Act, but considering the question of priority stated (R. 122):

> "It is earnestly urged that by right of sovereignty, the City is entitled to priority in the payment of its claim. At common law, the Crown had a priority over all subjects for the payment of debts due it. In a receivership case arising in a state where the common law prevailed without statutory modification, and where the Supreme Court of the State had not theretofore passed upon the question, we held that such prerogative right inhered in a city as an agency of the state exercising a delegated sovereignty. *City and County of Denver* v. *Stenger*, (C. C. A. 8) 295 Fed. 809."

In view of this finding we submit that if this court is of the opinion that Section 64 (b) of the Bankruptcy Act applies to municipal corporations, then it follows that petitioners are entitled to a final order allowing the City priority in the payment of its claim. The authorities submitted in support of the finding of the Circuit Court

of Appeals perhaps are not material in view of the limitation placed upon the scope of the review and for this reason no attempt has been made to be exhaustive on this point, our purpose merely being to briefly set forth the reasons for the finding of the Circuit Court of Appeals regarding the particular question.

I.

Section 64 (b) of the Bankruptcy Act giving priority to payment of debts entitled to priority under the laws of the States or of the United States applies to a municipal corporation, but was erroneously construed by the Circuit Court of Appeals to exclude such a corporation from any priority whatever.

Section 64 (b) of the Bankruptcy Act (11 U. S. C. A. 104 [b]), insomuch as it is involved in the present case, is set forth on page 5 hereof.

The only question of interpretation before the Court is whether a debt owing to a municipal corporation is included within the meaning of this section of the Bankruptcy Act. The Supreme Court has not had occasion to construe the particular sub-section quoted since it was changed by amendment in 1926. The particular question has never been presented to the court either before or after the amendment.

The provisions of sub-section (7) prior to the amendment are to be found in sub-section (5) which then read as follows:

> "The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates and the order of payment shall be * * * (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."

In reaching the conclusion that Section 64 (b) did not apply to a debt owing to a municipal corporation, the Circuit Court of Appeals said (R. 122):

> "It is contended that this section of the bankruptcy act preserves the City's right as a sovereign to priority in payment of its debt in the provision that 'debts owing to any person who by the laws of the States or the United States is entitled to priority.' It is observed that the statute defines the scope to be given to the term 'person', it being provided that it shall include corporations, the United States and the several States and Territories of the United States.' It makes no mention of municipalities, counties, or other subdivisions of the Government, and hence, we think they are necessarily excluded."

In other words, the Circuit Court of Appeals has construed Section 64 (b) to exclude municipal corporations and deny them even the rights of priority to which any other corporation or person would be entitled. We believe such construction is unreasonable, unjustified, and results from a misinterpretation of the case of *Davis* v. *Pringle*, 268 U. S. 315.

1. Circuit Court of Appeals Misinterpreted Case of Davis v. Pringle.

The erroneous construction of the act in question results from a misinterpretation or a misapplication by the Circuit Court of Appeals of the principle announced in *Davis* v. *Pringle*, 268 U. S. 315. In that case Justice Holmes denies priority to the United States because other parts of the Bankruptcy Act in giving the United States priority specifically mention it by name and he therefore concludes that the United States was not intended to be included in the word "person". On this point Justice Holmes says:

> "It is incredible that after the conspicuous mention of the United States in the first place at the beginning of the section and the grant of a limited priority, Congress should have intended to smuggle in a general preference by muffled words at the end."

The Circuit Court of Appeals failed to recognize that a very different situation exists as to a municipal corporation for, as will hereafter be shown, wherever it was intended to exclude a municipal corporation a specific exception followed the word "corporation". In other words, it will be observed that the Bankruptcy Act treats a municipal corporation as included within the general designation "corporation" and where it is desired to exclude municipal corporations it is mentioned as a specific exception to "corporations".

That a municipal corporation is included in the word "person" as used in the Bankruptcy Act is shown by Section 4a of the Bankruptcy Act, 11 U. S. C. A., Sec. 22, which provides as follows:

> "Any **person, except a municipal,** railroad insurance, or banking **corporation,** shall be entitled to the benefits of this title as a voluntary bankrupt."

It is apparent that if a municipal corporation was not included in the word "person", there would be no reason to except it from the operation thereof.

That the word "corporation" as used in the Bankruptcy Act includes a municipal corporation, is shown by Section 4b of the Bankruptcy Act, 11 U. S. C. A., Sec. 22, which provides in part:

> "* * * **any** moneyed business, or commercial **corporation, except a municipal,** railroad, insurance, **banking corporation,** * * *."

If the word "corporation" did not include municipal corporations there would have been no reason to have included it in the exception.

It has been asserted that the word "corporations" as used in Section (7) means only a corporation as defined in Section (1) of the Bankruptcy Act, 11 U. S. C. A., Section 1 (6) which it is claimed would exclude municipal corporations. In examining this definition consideration should be given to the words at the beginning of the section. These words are "The words and phrases used in this title and in proceedings pursuant hereto shall, **unless the same be inconsistent with the context,** be construed as follows: "* * * (6) 'Corporations' shall mean all bodies having **any** of the powers and privileges of private corporations not possessed by individuals or partnerships * * *." This definition could easily include municipal corporations as they are bodies having some of the powers and privileges of private corporations not possessed by individuals and partnerships as for example the power privilege of perpetual succession. But even if intended to exclude municipal corporations, we believe the qualifying words "unless the same be inconsistent with the context" should be applied to the use of the word "corporation" in Section 64 (b) (7) and a construction thereof denying to a municipal corporation the same rights of priority allowed a private corporation is unjustified. In *Re Worcester County*, 102 Fed. 808, 815 (1 C. C. A.), it was held that a county was included in Section 64 (b) because Section 1 (6) defined a person as including a corporation and a county was a corporation.

Opposing counsel have asserted that because Section 64 (a) specificially directs the payment of taxes prior

to other debts, Section 64 (b) should not be construed to include a municipal corporation. We do not agree with this contention. Section 64 (a) provides:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality, * * *."

The use of the word "municipality" in the section just quoted does not militate against the argument heretofore made by us. It is not used in contradiction to the word "corporation". It is obvious that the word "corporation" would be inappropriate to use in this part of the law because taxes are not payable to corporations generally, but only to governmental agencies, which it will be observed are specifically described.

The corollary of the principle announced in *Davis v. Pringle, supra,* is that where in some instances a law specifically excepts a special class from a general class the use of the word describing the general class without the exception clearly shows an intention to treat the special class as covered by the words used to describe the general class. In other words, an examination of the entire Bankruptcy Act shows it intends to include municipal corporations within the designation "corporations" or "persons" unless specifically excepted. Therefore, a municipal corporation is included in the priority granted by Section 64 (b) because not specifically excluded by an exception.

The quotation on page 10 hereof from Justice Holmes' opinion might be properly paraphrased to apply to this case as follows:

> "It is incredible that after the conspicuous mention of a municipal corporation as an exception

> the use of the word 'corporation', Congress should have intended to smuggle in a specific exception to a general preference by attaching a limited meaning to the word 'corporation' which would exclude municipal corporations."

We believe that the reasoning of Justice Holmes when applied to the different situation existing as to municipal corporations fully justifies the conclusion that municipal corporations were entitled to priority under Section 64 (b) before the 1926 Amendment. If there was any doubt existing prior to 1926, as to the intention of Congress to allow priority to all creditors, it was removed by the amendment made that year, adding the words:

> "* * * provided, that the term 'person' as used in this section shall include corporations, the United States and the several states and territories of the United States."

The presumption is that Congress was aware of the construction placed upon the act by this court. (See *Jordan* v. *Roche*, 228 U. S. 436, 445, 446; *In re Hauger*, 54 Fed. [2d] 117 [D. C. Texas]). Therefore, in adding the 1926 Amendment, Congress showed clearly that it had intended Section 64 (b) to cover debts owing every kind of creditor, including the United States, the several states and territories of United States and corporations generally and the amendment is a rejection of the limitation placed on the act by the court in *Davis* v. *Pringle*. The purpose of the amendment, we believe, to be a declaration of the prior legislative intent, that the word persons shall be construed liberally to include all to whom or to which the debts described may be owing. Contrary to the more usual function of a proviso, to limit and cut down, the meaning of a preceding general term, the function here is to enlarge the meaning of "persons" if there

be any doubt as to the inclusiveness of the term. The office of a proviso is not always one of limitation, but its effect is to be ascertained from a general view of the statute. *Detroit Street R. Co.* v. *Detroit,* 64 Fed. 629, 645 (C. C. A. 6); *Ohio* v. *Helvering,* 292 U. S. 360, 370. See also, *Georgia Banking Co.* v. *Smith,* 128 U. S. 174, 181, where it is said:

> "The general purpose of a proviso, as is well known, is to except the clause covered by it, from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. **But it is often used in other senses.** It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided', so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

Our contention as to the purpose of the 1926 Amendment and the proper application of the principle announced in *Davis* v. *Pringle,* is supported by an article in the Harvard Law Review, Volume 40, pages 345 and 346, written by James Angell McLaughlin, a professor in Harvard Law School. In discussing this question, he says:

> "The rule of *Davis* v. *Pringle* is reversed, and the United States and the states are expressly declared to be 'persons' which may have priority in bankruptcy on claims other than taxes in accordance with other federal or state laws. Such priority remains of a deferred class—that immediately preceding the claims of creditors to dividends.

"It has been pointed out that litigation may arise by reason of the fact that it is not expressly declared that counties, districts or municipalities are entitled to such priority on claims other than taxes. This is in contrast to the language of Section 64 (a) which specifies that taxes owing to 'the United States, state, county, district or municipality' shall have the next preceding degree of priority. The argument will be made that such governmental units are by implication denied priority on other than tax claims even when it is granted them by state law. **As applied to municipal corporations such an argument should not prevail.** *Davis* v. *Pringle* was a case of priority claimed by the United States. The argument for the government upon the act as it stood was this. Section 64 (b) gives persons priority in accordance with the laws of the United States. The United States is a corporation, a corporation is a person as defined in Section 1 (19), and is entitled to priority by reason of Section 3466 of the Revised Statutes. The Supreme Court thought that Congress would, if it intended the United States to have the claimed priority in bankruptcy, have provided for it by direct expression instead of through such a 'logical concatenation.' Shortly before the Act of 1926, the decision had been interpreted to exclude a state from priority provided by the state Law. **The amendment in repudiating Davis v. Pringle as applied both to its own facts and to state priorities would seem to be a repudiation of the reasoning on which that case is based. A municipal corporation is clearly a person within the Bankruptcy Act not only because the definition of a person covers it, but because it is expressly referred to as a person in Section 4 (a). Furthermore there is less reason to apply the rule of Davis v. Pringle to a state or a municipal corporation than to the United States.** If Congress meant the United States to have a priority, it could easily have said so. There has never been even a suggestion that Congress should set up a priority

> for states or municipalities that the states would not claim for themselves or establish for the benefit of their municipalities. **With reference to these, the natural thing was simply to allow them to be covered by a general clause recognizing priorities established by state law."**

The reasoning in the foregoing article by Professor McLaughlin is logical. The construction which he places on this amendment and the decision in *Davis* v. *Pringle* justifies the inclusion of a debt due a municipal corporation within the provisions of Section 64 (b).

2. Legislative Intent Should Be Considered In Construing A Statute.

It is, of course, proper to consider the legislative intention as indicated by the adoption of the law and the amendment thereto.

The case of *Barrett* v. *Van Pelt*, 268 U. S. 85, in which the principle discussed is reiterated is interesting in illustrating the extent to which the court will go in effectuating the intent of the legislative body. In this case the court in construing a section of a statute did not merely give a broad interpretation to a word found therein, but actually supplied a different word and construed the provisions of the act as though the legislature had inserted the supplied word in lieu of the term actually found within the act.

In the opinion Justice Butler says:

> "* * * The intention of the law-maker constitutes the law. *Stewart* v. *Kahn, Stewart* v. *Bloom*, 11 Wall. 493, 504. See *Smythe* v. *Fiske*, 23 Wall, 374, 380. Being satisfied of the legislative intention, the court will not be prevented from giving that intention

effect by a too rigid adherence to the very word and letter of the Statute. *Oates* v. *First National Bank*, 100 U. S. 239, 244. Having found that the word 'damage' was intended to be used, the court applies the rule that, 'A thing which is within the intention of the makers of a statute is as much within the Statute as if it were within the letter; and a thing which is within the letter of a statute, is not within the statute, unless it is within the intention of the makers.' *People* v. *Utica Insurance Company*, 15 Johns. 358, 381; *Hawaii* v. *Mankicki*, 190 U. S. 197, 212."

The intention of Congress appears to have been to provide in this case for the order of payment of various types of "debts." The term emphasized throughout Section 64 (b) is "debts". Congress was apparently not concerned with the question as to whom such debts were owed. It sought to classify various obligations, depending upon their nature, and fixed an equitable and practical order of priority. Claims representing costs of administration are preferred. The reason is practical. If this type of claim is not preferred there will probably be no proper administration and debtors might not receive anything. An examination of this section shows the emphasis is not towards the claimant, but is on the nature of the debt. Having this emphasis in mind, the word "person", as used in the last sub-section, is of the broadest possible scope. It is in the nature of an omnibus section. All debts differing in some way from ordinary debts so that under local or federal law, in the absence of bankruptcy they would be preferred, are given a priority in the order of payment over common debts. The purpose is to preserve valid rights, presumably acquired through diligence or valid rights acquired because as a matter of policy local laws deem certain debts shall have precedence in the order of payment from insolvent estates. The nature

of the debt with regard to its priority of payment under local law is the point emphasized. Wherever there is a debt there must be a creditor, and the word "person" is used in this sense, that is, it is co-extensive in scope with the scope of the debts included within the meaning of the section.

That Congress intended Section 64 (b) to apply to all debts of the classes mentioned regardless of the kind of a creditor, is emphasized by the 1926 Amendment broadening the scope of the word "person", as applied to creditors. To exclude a municipal corporation from the terms of this section as amended, is to ascribe to Congress an intention to draw a distinction where none in fact exists.

3. A Reasonable Construction Should Be Given To A Statute To Effectuate The Legislative Intention.

The principle that a reasonable construction should be given to a statute to carry out the legislative intention is, of course, well established. It is stated by Justice Sutherland in *Ozawa* v. *United States*, 260 U. S. 178, in the following language:

> "It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail: See *Holy Trinity Church* v. *United States*,

143 U. S. 457; *Heydenfeldt* v. *Daney Gold Mining Company*, 93 U. S. 634, 638."

The same principle is stated by Justice Roberts in the recent case of *Royal Indem. Co.* v. *American Bond & Mortgage Co.*, 289 U. S. 165, 169, as follows:

"* * * We should therefore construe the language of the act so as to effectuate the evident purpose of the legislation, and not so narrowly as to defeat the true intent of Congress."

The manifest intention of Congress in passing Section 64 (b) seems to have been to provide for the allowance of priority to any debts entitled to such priority in the absence of bankruptcy. No other intention can reasonably be ascribed to that section. This intention is emphasized by the 1926 Amendment in enlarging the scope of the original language to include not only the United States, which had been excluded by the court's construction in *Davis* v. *Pringle, supra*, but also to specifically include corporations, states and territories. No sound reason for excluding a debt due a municipal corporation can be found.

This court has recently passed upon a very similar situation which strongly supports our contention. In *Ohio* v. *Helvering*, 292 U. S. 360, 370, the word "person", as well as the word "corporation", were each construed to include a state. In holding that a state was included within the term "person", as used in the United States statute imposing a tax on every person selling liquor, Justice Sutherland says:

"**We find no merit in the further contention that a state is not embraced within the meaning of the word 'person'**, as used in U. S. C. title 26, Sec. 205 and defined in Sec. 11, supra. By Sec. 205

the tax is levied upon every 'person who sells, etc.;' and by Sec. 11 the word 'person' is to be construed as meaning and including a partnership, association, company or corporation, as well as a natural person. Whether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in which the word is found. Thus, in *Stanley* v. *Schwalby*, 147 U. S. 508, 517, 37 L. ed. 259, 263, 13 S. Ct. 418, it is said that the word 'person' in the statute there under consideration would include the United States as a body politic and corporate. See also *Giddings* v. *Holter*, 19 Mont. 263, 266, 48 Pac. 8; *State* v. *Herold*, 9 Kan. 194, 199. A state is a person within the meaning of a statute punishing the false making or fraudulent alteration of a public record 'with intent that any person may be defrauded.' *Martin* v. *State*, 24 Tex. 61, 68. Under a statute defining a negotiable note as a note made by one person whereby he promises to pay money to another person, and providing that the word 'person' should be construed to extend to every corporation capable by law of making contracts, it was held that the word included a state. *Indiana* v. *Woram*, 6 Hill 33, 38, 40 Am. Dec. 378. **And a state is a person or a corporation within the purview of the priority provisions of the bankruptcy act.** Re *Western Implement Co.*, (D. C.) 166 Fed. 576, 582. Compare *Re Jensen*, 28 Misc. 378, 59 N. Y. Supp. 653, 655; *Bray* v. *Wallingford*, 20 Conn. 416, 418; *Lancaster County* v. *Trimble*, 34 Neb. 752, 756, 52 N. W. 711; *Rains* v. *Oshkosh*, 14 Wis. 372, 374; 1 Bl. Com. 123."

It will be observed that the court specifically recognizes that "a state is a person or a corporation within the purview of the priority provisions of the bankruptcy act". The priority provision referred to is Section 64 (b). If a state is within the meaning of the word "corporation"

as used in this section, certainly a municipal corporation would likewise be included. After then discussing a different view, Justice Sutherland continues:

> "* * * While not rejecting that view, we prefer, in the light of the foregoing examples, to place our ruling upon the broader ground that the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension."

The principle announced is even more applicable to the present case. In the foregoing case a reason for not including the state within the term of either "person" or "corporation" and thus making it subject to an excise tax was the constitutional provision against taxing the state. But even so the court rejected that reason and held there was no basis for discriminating in favor of the state. In the present case no reason of any kind exists for holding a municipal corporation is not included within the meaning of either the term "person" or "corporation" as used in Section 64 (b). Likewise there is no basis for discriminating against a municipal corporation by denying it any priority whatever under this section while allowing priorities to any other person, corporation, state, territory and the United States.

Not only is it reasonable to consider municipal corporations included in the general designation of persons or corporations, but also it would seem proper to treat a municipal corporation as included in the term "states". A municipal corporation is merely a subdivision or part of a state and has been frequently referred to by the courts as an agency of the state.

According to *City of Denver* v. *Stenger*, 295 Fed. 809 (C. C. A. 8), the city is an agency of the state and is therefore entitled to every right of priority that is possessed by the state. In *Trenton* v. *New Jersey*, 262 U. S. 182, 187, the court says: "A municipality is merely a department of the state." In *Worcester* v. *Worcester Co.*, 196 U. S. 539, 548, the court says: "A municipal corporation is simply a political subdivision of the state." If a city is "merely a department of the state," or "simply a political subdivision of the state", it would seem most unreasonable to hold that a city should be denied the priority accorded the state of which it is a part.

In *Re Worcester County*, 102 Fed. 808, 815 (1 C. C. A.), it was held that the provisions of Section 64 (b) applied to a county. The court determined that a county was a corporation and therefore Section 64 (b) applied because the word person used therein was defined by Section 1 of the Bankruptcy Act to include a corporation.

Construing the language to effectuate the evident purpose of the legislature, namely, to allow priority to all debts entitled to priority under a state or federal law, a debt due a corporation must certainly be included within Section 64 (b).

4. A Statute Should Be Construed To Avoid Unjust or Absurd Results.

Wherever possible a construction will be placed on a statute to avoid an unjust or absurd result. This rule is stated by Justice Cardozo in *Burnet* v. *Guggenheim*, 288 U. S. 280, 286, as follows:

> "A statute will be construed in such a way as to avoid unnecessary hardship when its meaning is uncertain."

The same principle is stated by Justice Stone in *U. S. v. Ryan*, 284 U. S. 167, 175, in the following language:

> "All laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose."

The foregoing rules should conclusively establish the correctness of the construction of Section 64 (b) to include debts due a municipal corporation. Certainly to construe this statute to exclude such debts but to include those due all other types of creditors will produce not only absurd, but also unjust results. No reason to thus discriminate against municipal corporations exists. In *Wheeler* v. *Johnson*, 26 Fed. (2d) 455 (8 C. C. A.), debts due creditors or depositors of a failed bank were held to be entitled to priority against an insolvent stockholder of the bank under Section 64 (b) because given priority under a state statute. Suppose one of the creditors or depositors was a municipal corporation. Under the decree of the court in the present case every creditor of the bank would be entitled to priority except the municipal corporation. A construction of Section 64 (b) leading to such an absurd result is utterly unjustified. Surely the minimum consideration given such a corporation would be to allow it at least the same rights as other corporations and individuals. There is no conceivable reason why a state should be protected and a subdivision thereof excluded. Congress, acting for the people, cannot be presumed to have an intention to hamper municipal cor-

porations in the collection of their obligations where no like inhibition is provided as to private corporations and where there is no distinction. The very reason why sovereigns are allowed a priority, namely, to protect and conserve public funds, should entitle a city to the same rights as a state. In the recent case of *Helvering* v. *New York Trust Co.*, 292 U. S. 455, in discussing the effect of a literal construction of a tax law, Justice Butler says:

> "In respect of the legislative purpose to lessen hindrance caused by high normal and surtaxes, there is no distinction between gains derived from a sale made by an owner who has held the property for more than two years and those resulting from one by a donee whose tenure plus that of the donor exceeds that period.
>
> "* * * No valid ground has been suggested for requiring tenures to be added for the one purpose and forbidding combination for the other. The legislative purpose to be served by the application of the lower rate upon capital gains is directly opposed to the Commissioner's Construction. **There is no ground for discrimination** such as that to which the trustee was subjected. **It is to be inferred that Congress did not intend penalization of that sort.**"

And it may likewise be inferred that Congress did not intend to penalize municipal corporations in the collection of their debts by the terms of Section 64 (b) of the Bankruptcy Act and the wording of this section far more readily lends itself to the construction we contend for than the wording of the revenue act lent itself to the construction placed upon it by the court in *Helvering* v. *New York Trust Co., supra.* The unjust and absurd consequences resulting from the construction placed on this act by the Circuit Court of Appeals should alone justify a reversal of this judgment.

II.

Section 64 (b) of the Bankruptcy Act applies and under it a municipal corporation is entitled to the common law right of priority accorded a sovereign which has been adopted by the statutes of Nebraska.

If we have established that Section 64 (b) applies to a municipal corporation, then it becomes important to determine whether its application gives to petitioners the priority asserted. We therefore deem it proper to discuss this specific priority which petitioners claim.

1. Sovereign Is Entitled To Priority In Payment Over General Creditors.

The rule that a sovereign is entitled to priority over general creditors is recognized in *Marshall* v. *New York*, 254 U. S. 380, 382, 386. In that case the State of New York claimed a priority from a receiver appointed by a federal court, for a franchise tax due under a New York law.

The court granted the priority in that case even though there was no New York statute relating to the adoption of the common law. On this point the court says on page 386:

> "The fact that the right rests on the common law, independently of any statute, does not, of course, affect the right of enforcement in the Federal courts."

The Eighth Circuit in *City of Denver* v. *Stenger*, 295 Fed. 809, approved the granting of priority to a sovereign. This case will be discussed under the next heading.

2. Common Law Right of A Sovereign To Priority Has Been Adopted By Statute of Nebraska.

The right of a sovereign to priority has been adopted by statutory enactment in Nebraska and such right of priority belongs not only to the State of Nebraska, but to the City as its agent.

Section 49-101 of the C. S. of Nebr. for 1929, provides:

> "**Common Law in Force.** So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within the State of Nebraska (R. S. p. 31; Ann. 6955; Comp. 1934; R. S. 1913, 3697; C. S. 1922, 3085)."

Although this statute has been repeatedly applied by the Supreme Court of Nebraska, it has never had occasion to consider it in connection with the sovereign right of priority. However, a decision of the Eighth Circuit Court of Appeals in *City of Denver* v. *Stenger,* 295 Fed. 809, is directly in point and fully supports the right of the City to priority. In that case the City and County of Denver claim priority in the payment of its claim against the Receiver of the Denver Tramway Company for payments due it under a contract granting to the company the right to the use of certain streets. Judge Stone in deciding the case held that the claim was entitled to priority not on the theory that it was a tax or a rental, but because it was a debt due a sovereign. Because of the logical disposition made of the many objections raised to granting priority, we quote at length from the opinion. In discussing these questions the court says on page 815:

"The final contention is that the claim is entitled to the priority accorded a debt due the sovereign under the common law. We think this contention well founded. **Under the common law, the sovereign had a right to a certain preference in payment.** *Marshall* v. *N. Y.*, 254 U. S. 380, 382, 41 Sup. Ct. 143, 65 L. Ed. 315; *United States* v. *Bank of N. C.*, 6 Pet. 29, 35, 8 L. Ed. 308. The common law is by statutory authority (section 6516, Comp. L. Colo. 1921), in force in Colorado. **Appellant is an agency of the state exercising the delegated sovereignty thereof in local matters. It is entitled to whatever priority the state might demand.** Appellee challenges any such priority on four grounds: That no decision of the Colorado courts has held that such priority exists as a prerogative right of the sovereign instead of as a mere administrative rule; that the priority applies only to a tax and this is not a tax; that the basis for this franchise obligation rests solely on exercise of the power of the proprietor and not of the sovereign; that the right is lost when specific liens exist in advance of assertion of such priority. The logical result of the first contention would be that, although this attribute and advantage attaching to sovereignty was recognized and enforced at common law and although the common law is placed in full force by the statute of a state yet, until the highest court of that state shall declare this right to exist as a prerogative of sovereignty, no federal court can recognize it. This is, in effect, to require federal courts to recognize the right as purely a domestic administrative policy of the state until the high state court has declared it to be prerogative. If any presumption must be indulged, why not make use of the more reasonable one, which is that this undoubted right of the state is enforceable in any form? Since the rule has ref-

erence to the public good it should receive no strict nor narrow interpretation." *United States* v. *Bank of N. C.*, 6 Pet. 29, 35, 8 L. Ed. 308:

"The second contention, that the priority of the sovereign attaches only to taxes, is unsound. **The reason for the rule is public policy which declares that it is more important for the state—all of the people—to have its money than for any single citizen or group of citizens. The rule covers all manner of debts due the state** (*United States* v. *Bank of N. C.*, 6 Pet. 29, 35, 8 L. Ed. 308), whether the origin of such be involuntary imposts or voluntary obligations (*Marshall* v. *New York*, 254 U. S. 380, 382, 383, 41 Sup. Ct. 143, 65 L. Ed. 315, and cases there cited). The above determination of the second contention disposes of the third contention that the obligation under this franchise is based on the proprietary function of the municipality. This is so, because if the rule applies to all debts due the state, it would cover those arising from exercise of proprietary functions, hence it is immaterial here and we need not inquire whether the municipality was exercising a proprietary or a sovereign function."

The Colorado statute, Sec. 6516, Comp. L. Colo. 1921, provides in part "the common law of England, so far as the same is applicable and of a general nature * * * shall be the rule of decision and shall be considered as of full force until repealed by legislative authority." The Nebraska statute, as quoted on page 26 hereof, is substantially the same as the Colorado statute except the qualifying words "of a general nature" do not appear in the Nebraska statute.

It will be observed the court specifically decides that a city is entitled to such priority. On this point Judge Stone says:

> "* * * **Appellant is an agency of the state exercising the delegated sovereignty thereof in local matters. It is entitled to whatever priority the state might demand.**"

The rule that a city is an agency and subdivision of the state is recognized by this court in *Worcester* v. *Worcester Co.*, 196 U. S. 539, and *Trenton* v. *New Jersey*, 262 U. S. 182. If a city is merely a department or subdivision of the state, the holding of the court in *City of Denver* v. *Stenger*, *supra*, that a city is entitled to the same priority as the state is logical.

The reason why a sovereign is given the right of priority applies with equal force to a debt due a city as well as a debt due a state. It was stated by Judge Stone in the *City of Denver* v. *Stenger* case as follows:

> "* * * **The reason for the rule is public policy which declares that it is more important for the state—all of the people—to have its money than for any single citizen or group of citizens.**"

It will also be observed that Judge Stone says in the foregoing case:

> "* * * Since the rule has reference to the public good it should receive no strict nor narrow interpretation. *United States* v. *Bank of N. C.*, 6 Pet. 29, 35, 8 L. Ed. 308."

The case of *Aetna Casualty & Surety Co.* v. *Bramwell*, 12 Fed. (2d) 307 (D. C. Ore.), has been cited as holding the *Denver* v. *Stenger* case was not controlling because later the Supreme Court of Colorado held the common law right of priority had not been adopted in that state. But such a decision would not change the rule announced in

City of Denver v. *Stenger* that in the absence of a controlling decision by a state court the sovereign right of priority became a part of the laws of the state, which by express statute had adopted the common law.

The *Denver* v. *Stenger* case is therefore squarely in point and determines that the right of a sovereign to priority has become a part of the Nebraska law and such sovereign right belongs to a city as an agent of the state.

3. Right of Sovereign To Priority Is Recognized In Bankruptcy Proceedings.

The foregoing rule that a sovereign is entitled to priority in payment of its debt applies in bankruptcy proceedings. In *Alamac Operating Corporation*, 42 Fed. (2d) 120 (C. C. A. 2), it was held that the right of the State of New York as a sovereign to priority in the payment of its debt was enforceable in bankruptcy proceedings. The same rule was followed in *State of Oregon* v. *Ingram*, 63 Fed. (2d) 417 (C. C. A. 9), certiorari denied, 290 U. S. 630, and *In re Martin*, 75 Fed. (2d) 618. In the last mentioned case the court in rejecting appellant's contention said:

> "Indeed, if appellant were correct in his assertion that bankruptcy was such a transfer of the debtor's property as would destroy the state's priority, section 64b (7) would wholly fail of its manifest purpose to preserve in bankruptcy whatever right of priority the creditor had under the laws of the state before the bankruptcy intervened."

CONCLUSION.

We earnestly contend that a reasonable interpretation of the language used in Section 64 (b) shows a legisla-

tive intention to give all debts the same priority which they would have received under the laws of a state or of the United States. To construe this section to exclude a municipal corporation from any priority whatever is an unjust and an unfair discrimination against such corporations. If the law is construed to apply to municipal corporations, unnecessary hardships and absurd consequences will be avoided and at the same time the legislative intention will be effectuated.

If Section 64 (b) is construed to apply to a municipal corporation, then it should be applied in the present case to give the City the priority accorded a sovereign. This court has heretofore held in *Marshall* v. *N. Y.*, 254 U. S. 380, that at common law a sovereign was entitled to priority in the payment of debts due it. The opinion of the Circuit Court of Appeals in the present case recognizes the correctness of the rule previously announced in *City of Denver* v. *Stenger*, that a state statute adopting the common law includes the right of a sovereign to priority. The Nebraska statute adopting the common law is even broader than the Colorado statute construed in the foregoing case. Furthermore, in *City of Denver* v. *Stenger* the common law right of a sovereign is given to a city as an agent or subdivision of the state. This seems to be a proper application of the rule. The reason for the rule, namely, the protection of public funds, justifies the granting of such priority to a city the same as a state. In other words, there is just as much reason to protect the public funds of a city as to protect the public funds of a state. Particularly is this construction justified in view of the statement by Justice Story in *U. S.* v. *Bank of N. C.*, 31 U. S. 29, 35, that since the rule of sovereign priority has reference to the public good, it should not receive a strict and narrow interpretation."

We respectfully submit that Section 64 (b) applies to the claim involved herein and that the judgment of the Circuit Court of Appeals should be reversed with directions to allow the claim priority under subparagraph 7 of Section 64 (b).

Respectfully submitted,

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CHARLES B. PAINE,
Counsel for Petitioners.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY, PETITIONERS,

V.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT, RESPONDENT.

REPLY TO RESPONDENT'S BRIEF.

KARL W. KINDLEBERGER,
DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

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A. A. WHITWORTH,
CHARLES B. PAINE,
Counsel for Petitioners.

STATEMENT.

Respondent's brief presents several questions which we did not deem proper to discuss in our original brief be-

cause of the limited scope of the appeal. The order granting certiorari stated that it was "limited to the application of Section 64b of the Bankruptcy Act" (R. 129). We interpreted this order to restrict the appeal to the question as to whether Section 64b applied to a municipal corporation. If that question is decided by this court in the affirmative, then we have assumed that priority would be given to the City's claim. Under such conditions we limited our original brief to the application of Section 64b to a municipal corporation and a short statement of the statute and authorities entitling a Nebraska municipal corporation, under Section 64b, to the right of priority accorded a sovereign at common law. Because of the limited nature of the appeal we question whether respondent may assert other grounds than those given by the Circuit Court of Appeals for the purpose of supporting its judgment. For the reasons given, we do not believe the new questions presented in respondent's brief are properly before the court, but in the event they are given consideration by the court we submit this reply brief.

I.

Right of Priority Has Not Been Waived.

It is asserted by respondent on pages 18 to 22 of his brief that the City has waived its right to the priority accorded a sovereign because it failed to assert such right prior to the time the Trust Company was adjudicated a bankrupt.

The record does not show that the respondent raised any such question either before the Referee or before the District Court. The question was first raised in respondent's brief filed in the Circuit Court of Appeals. Objection was then made by petitioners in a reply brief filed in the Circuit Court of Appeals that the question was not properly before the court.

The record shows that the right of the City to priority as a sovereign was asserted, considered and passed upon by the Referee (order disallowing priority R. 25, 26, certificate of Referee on review R. 36). It was also considered by the District Court (request for findings of fact and conclusions of law R. 38, original order allowing priority as a sovereign R. 39, later order denying right of a sovereign to priority R. 43, and finding of fact that City, ever since the amendment of its claim, has asserted the sovereign right of priority R. 58). It was likewise considered by the Circuit Court of Appeals (R. 122 and 123). In view of the fact that the Referee and the District Court passed upon the right to priority as a sovereign without any question being raised by respondent of a waiver of such right and that the Circuit Court of Appeals did not consider the claim that such right had been waived, we do not believe the question is properly before this court because of the well recognized rule that appellate courts will not pass upon questions which are presented there for the first time. See *In re Schulte*, 59 Fed. (2d) 553, 559 (C. C. A. 8), and *Bachman* v. *McCluer*, 63 Fed. (2d) 580, 583 (C. C. A. 8).

Furthermore, we do not believe the question is properly before this court in view of the provision of the order granting certiorari that it is "limited to the question of the application of Sec. 64b of the Bankruptcy Act" (R. 129). However, if this court should deem it proper to consider this particular contention, we believe it will be found to be without merit. None of the authorities cited by respondent support his statement that the right of a sovereign to priority under Section 64b of the Bankruptcy Act is lost if not asserted before bankruptcy.

The cases cited by respondent that a trustee's lien is superior to other liens are not in point because the right of a sovereign to priority under Section 64b is not based

on a lien but is a rule to be followed in the distribution made to creditors. To require the assertion before bankruptcy of such right of priority would be unjust and impractical and would frequently deprive a creditor of a priority to which he was otherwise entitled. See *Lott* v. *Salsbury*, 237 Fed. 191 (C. C. A. 4).

As a matter of fact the right to such priority need not be asserted until the trustee is ready to pay dividends to creditors. See *In re Worcester County*, 102 Fed. 808, 813 (C. C. A. 1) and *In re Jones*, 151 Fed. 108, 110 (D. C. Mich.).

Respondent concedes that *State of Oregon* v. *Ingram*, 63 Fed. (2d) 417, 420 (C. C. A. 9), certiorari denied 290 U. S. 630, and *In re Alamac Operating Corporation*, 42 Fed. (2d) 120 (C. C. A. 2) hold that the right of a sovereign to priority may be asserted after the commencement of bankruptcy proceedings. Respondent states that these two cases stand alone. The reasoning in these cases is logical and the rule announced therein justifies its adoption by this court.

In the more recent case of *In re Martin*, 75 Fed. (2d) 618, 621 (C. C. A. 7), the court rejects respondent's contention, stating that if it were correct, Section 64b "would wholly fail of its manifest purpose to preserve in bankruptcy whatever right of priority the creditor had under the laws of the state before the bankruptcy intervened."

Summarized, it is petitioner's contention that the question of a waiver by the City of its right to priority as a sovereign because it failed to assert such right prior to bankruptcy is not properly before this court but if it is considered there is no merit to the claim of a waiver

Under the authorities cited the right to priority can be asserted any time before payment of dividends. The right having been considered by the Referee and the District Court without any claim of waiver being made and the right of the City to the priority of a sovereign having also been considered by the Circuit Court of Appeals, it should now be determined by this court upon its merits.

II.

Decisions Cited By Respondent Do Not Support His Contention That the Common Law Right of a Sovereign to Priority Is Not Recognized in Nebraska.

Respondent, on page 23 of his brief, states that the Nebraska statute adopting the common law has been before the Supreme Court of Nebraska "on several occasions and in nearly every instance the court has found it ineffective for one reason or another." Respondent then cites a number of Nebraska cases construing this statute. However, **every one** of these cases recognizes the common law as a part of the Nebraska law in the absence of a constitutional provision or legislative act on the subject. The only reason why the common law rule is not followed in the cases cited by respondent is because in each instance a Nebraska statute had been enacted which in some way changed the common law rule.

1. Recent Nebraska Decisions Recognize Common Law As Adopted By Statutory Provision.

As a matter of fact the statutory provision adopting the common law has been repeatedly recognized in Nebraska. Within the past year the Supreme Court of Nebraska has, in at least three different cases, applied the common law because of its adoption by this statute.

The latest expression of the Supreme Court of Nebraska on this statute adopting the common law is found in *Roberts* v. *Rogers*, 261 N. W. 354, not yet contained in the Nebraska reports. In that case the court says:

> "In other words, in this jurisdiction, by legislative action (Comp. St. 1929, sec. 49-101), we have adopted the common law of England as governing the relation of landlord and tenant."

In the recent case of *Carlsen* v. *State*, 261 N. W. 339, not yet contained in the Nebraska reports, the Supreme Court of Nebraska says:

> "**The writ of error coram nobis,** to bring into the records facts which were unknown to the defendant at the time of trial, through no lack of reasonable diligence on his part which, if known at the time of the trial, would have resulted in a different judgment, **exists in this state under Section 49-101, Comp. St. 1929.**"

In the case of *Taylor, Admr.* v. *Koenigstein*, 128 Neb. 809, 260 N. W. 544, the adoption of the common law by Section 49-101 is recognized.

A number of cases are cited by respondent on page 25 of his brief which indirectly question whether the right of a sovereign to priority is based on the English common law or on an English statute. Any question on this point is fully answered by the opinion of Justice Brandeis in *Marshall* v. *New York*, 254 U. S. 380, where he says, referring to the right of a sovereign to priority, at page 386:

> "The fact that the right rests on the common law, independently of any statute, does not, of course, affect the right of enforcement in the federal courts."

2. Opinion of Supreme Court Commission Is Not Entitled to Any Consideration.

Respondent concedes that the Supreme Court of Nebraska has not passed upon the existence in Nebraska of the right of a sovereign to priority. However, on page 25 respondent refers to an unreported opinion of a previous Supreme Court Commission and the opinion is set out at length in the appendix. The opinion does not support respondent's contention that the right of a sovereign to priority is not recognized in Nebraska.

In the first place, a decision by the Supreme Court Commission **does not establish any precedent.** Section 27-224, C. S. of Neb. 1929, specifically provides with reference to such decisions:

> "Such proceedings shall not be published in the reports of the court or in any other reports, **and shall establish no precedent and be authority only in that particular case.**"

In the recent case of *McIntosh* v. *Standard Oil Co.*, 121 Neb. 92, 236 N. W. 152, the Supreme Court of Nebraska refused to consider a Commissioner's opinion which had been cited to it and said:

> "As to the case of *Lincoln Drug Co.* v. *Davidson*, No. 24836, on which the defendant relies, it may be said that **this court can give no consideration whatever to the latter** in the instant case. **It is a commission opinion.**"

The statement near the end of page 25 of respondent's brief that the commissioner's opinion is "considered the law of the state until overruled by an express opinion of the court itself", is unsupported by any authority and is directly contrary to the statutory provision and the holding in *McIntosh* v. *Standard Oil Co.*, *supra.*

Surely if the Supreme Court of Nebraska states that it "can give no consideration whatever" to a commissioner's opinion, it is entitled to no consideration by this court.

However, if consideration is given to the commissioner's opinion, we do not believe the construction placed upon it by the respondent is correct. As a matter of fact the opinion specifically says that the authorities cited to sustain the sovereign right of priority "are convincing". The commissioner then approves the finding of the trial court that because the Nebraska law provides a complete plan for winding up the affairs of a bank, the sovereign right of priority did not apply. The opinion therefore appears to recognize that the school district would have been entitled to the priority of a sovereign if the case had not been governed by a specific banking statute.

If the commissioner intended to hold the sovereign right did not exist in Nebraska in any case, why did he cite authorities to show such right could not be allowed where a specific statute covered the rights of creditors of an insolvent bank? The opinion says that no Nebraska decisions have been cited to sustain the contention that this right exists and refers to an old New Jersey case holding that because such a right has never been asserted, it would seem to negative its existence. The commissioner further says that he has no knowledge of the right having been asserted in Nebraska. This can hardly be construed as an assertion that the right does not exist in Nebraska in view of the previous statement that the authorities holding such right to exist were "convincing".

If Nebraska had never asserted this power, it would hardly negative its existence. Treason against the state of Nebraska is a crime but because the state has never had occasion to prosecute anyone for treason would not prove that the right to do so no longer exists.

The same argument that a right did not exist because it had not been asserted for many years, was made in the Supreme Court of Nebraska in the case of *Carlsen* v. *State*, 261 N. W. 339, not yet found in Nebraska reports. In that case the plaintiff sought to use the common law writ of error, coram nobis. It was insisted that the right had become obsolete because of disuse in Nebraska and no case appears to have been found where it had been resorted to in Nebraska. However, the Supreme Court held that the right existed at common law when the section now known as 49-101, C. S. Neb. 1929, was adopted in 1866, and therefore it became and remained a part of the laws of Nebraska notwithstanding the fact it had not been asserted during the seventy years existence of the state.

Furthermore, if the commissioner's opinion was construed to hold that the sovereign right to priority did not exist in Nebraska, it would be only dicta, inasmuch as the opinion had previously held such right would not be applied because of a specific statute fixing the rights of creditors of a failed bank. We therefore submit that this court is not justified in considering the commissioner's opinion when by express statute, as well as a recent decision of the Supreme Court of Nebraska, the opinion is not entitled to consideration. Even if the opinion were construed to hold the right in question did not exist in Nebraska it would be most unusual to consider it as in any way a precedent for this court when by statute and decision it cannot be considered by the Nebraska courts.

3. A Sovereign Cannot Be Deprived of Its Right to Priority By Mere Inference.

On page 26 respondent contends that because some Nebraska statutes relating to payment of creditors do not give the state a priority it must be inferred such right

does not exist in Nebraska. But this contention of respondent violates the principle that a sovereign can only be deprived of its right to priority by special constitutional or legislative action and not by mere inference. This rule is stated in the recent case of *Commonwealth of Pennsylvania* v. *Stocker*, 70 Fed. (2d) 453, 454 (C. C. A. 3), as follows:

> "* * * Against this proposition cases generally, and cases in Pennsylvania, itself, are strong to the effect that **a state cannot be deprived of its rights of a sovereign by inference, that it must be manifested 'by explicit terms' and 'by appropriate constitutional or legislative action.'** *Commonwealth* v. *Baldwin*, 1 Watts (Pa.) 54, 55, 26 Am. Dec. 33; *Booth & Flinn* v. *Miller*, 237 Pa. 297, 307, 85 Atl. 457, 460. See *In the Matter of Neiderstein*, 154 App. Div. 238, 138 N. Y. S. 952; *In re Alamac Operating Corporation*, (C. C. A.) 42 Fed. (2d) 120."

Furthermore, the cases cited by respondent do not support his argument on this point. On page 26 he quotes from the opinion in *In re P. J. Potter's Sons*, 143 Fed. 407 (D. C. Ky.), holding that the right to priority under Section 64b must be evidenced by statutory provision or judicial rule. Of course, in the present case a statutory rule is involved, namely the statute in Nebraska adopting the common law, and under the reasoning in *Denver* v. *Stenger*, 295 Fed. 809 (C. C. A. 8), cited in our original brief, the common law right of priority accorded a sovereign became a part of the Nebraska law. Respondent failed to call the court's attention to the fact that the foregoing case of *In re P. J. Potter's Sons* was reversed by the Circuit Court of Appeals and a priority allowed. See *Smith* v. *Mottley*, 150 Fed. 266 (C. C. A. 6).

A number of statutes are referred to by respondent on pages 26 and 27 as not containing any provision for

priority to debts due the state of Nebraska. The fact that such priority is not specifically given the state is an indication that the right of the state to a priority exists under the common law as adopted by the statute heretofore cited. In this connection the case of *Alabama* v. *Martin*, 256 Fed. 313 (C. C. A. 5), is cited by respondent on page 27 as holding that the absence of a statutory provision granting priority to a state indicated an intention that no such priority existed. In that case it was held that Alabama was not entitled to priority of a debt owing by bankrupt for hire of convicts. The court stated that while the common law of England had been adopted by statute in Alabama, yet other statutes seemed to be inconsistent with the priority claimed to exist in favor of the state. The other statutes mentioned were one giving priority in payment of taxes owing by an insolvent estate and another statute governing an assignment for the benefit of creditors which allowed the same priority. It was held that inasmuch as the statutes mentioned did not give the state priority except for taxes, "furnishes some basis for an inference that the lawmakers recognize that debts owed by the state are not entitled to priority except when expressly provided for".

The basis for this decision is not to be found in Nebraska. Section 6-124 of the C. S. Neb. 1929, cited by respondent and relating to assignments for creditors, provides first for payment of fees, second taxes, third preferred claims in full and fourth, other creditors. The third provision could very properly include preferred claims due the state, county or city for debts other than taxes which had already been mentioned. Section 30-615, C. S. Neb. 1929, cited by respondent, relates to estates of insolvent debtors and provides first for payment of funeral expenses, second for expenses of last illness, third for payment of debts having preference by laws of the

United States, and fourth for the payment of debts due other creditors. The fact that it does not mention taxes or other debts due the state indicates that it recognized the right of the state to such priority without including it in the statute. Consequently both grounds for the reasoning in the Alabama case are absent under the Nebraska statutes. We do not find that the Alabama case has ever been cited and even if it supported respondent's contention it would be contrary to the more logical rule announced by the Eighth Circuit in *Denver* v. *Stenger* and by the Third Circuit in *Commonwealth* v. *Stocker*, heretofore cited.

Cases are cited by respondent on page 28 relating to failed banks. We do not see the materiality of these cases to the questions presented by this appeal. The bankrupt was not a bank but was a trust company. The cases cited relating to banks involve express statutes relating to bank deposits.

We therefore assert that neither the Nebraska cases or statutes cited in any way show an intention to deny the right of the state or its agents to the priority accorded a sovereign. A sovereign will not be deprived of such right by mere inference but only by constitutional or legislative action.

III.

Surety Is Subrogated to Right of Sovereign Including Priority.

Respondent at the end of page 28 suggests that if the City was protected by a bond it should not be allowed the sovereign right of priority because the reason for allowing such priority, namely, protection of public funds, does not exist. We do not believe that under the limited scope of this appeal any question can be raised by respondent concerning the right of the surety to be subrogated

to the City's claim upon payment thereof. But even if the question is considered, it is without merit. The record shows that at the time of the hearing on the right of the City to priority it had not been paid one cent on its claim by the bankrupt or by any surety. The fact that subsequent to the hearing the City may have received a payment to apply on its claim from the surety should not destroy the right of priority in the payment of the claim. The District Court held that the surety became entitled to all of the rights of the City (R. 58). The rule appears to be definitely established that a surety having paid an obligation and taken an assignment thereof is entitled to be subrogated to the priority rights of a sovereign. See *U. S. F. & G. Co.* v. *Union Bank*, 228 Fed. 448, 453 (C. C. A. 6). *In Hunter* v. *U. S.*, 30 U. S. 173, 182, this court, in holding the right of a sovereign to priority passed to a surety who paid the government, says:

> "The same right of priority which belongs to the government attaches to the claim of an individual, who, as surety, has paid money to the government. Under this provision, Smith could claim a preference to other creditors for the money he paid as surety for the Crarys; and on his right the priority of the government is asserted."

To the same effect see *In re Baltimore Pearl Hominy Co.*, 5 Fed. (2d) 553 (C. C. A. 4); *American Bonding Co.* v. *Reynolds*, 203 Fed. 356 (D. C. Mont.).

In *Shropshire* v. *Bush*, 204 U. S. 186, it was held the priority allowed under the Bankruptcy Act to wage earners extended to assignee. The court emphasizes the fact that the Bankruptcy Act allows priority to the "debt", not to the person of the creditor.

The statement is made by respondent on page 29 of his brief that the allowance of priority to his claim would:

> "* * * certainly violate the spirit of the bankruptcy law, and under the rule of this court, as stated in *Local Loan Company* v. *Hunt*, 292 U. S. 234, 78 L. Ed. 1230, the court would be justified in denying the priority even though the state itself had by definite law given such priority."

The statement is not supported by the case mentioned in the foregoing quotation. That case held an assignment of wages did not create a lien as to wages earned after bankruptcy, even though the Illinois court had held to the contrary. Justice Sutherland stated that to hold the assignment valid as to wages earned after bankruptcy would violate the purpose of the Bankruptcy Law, namely, to relieve a debtor of his obligations and give him an opportunity to start over. Giving priority to the City's claim would not violate the purpose of the Bankruptcy Act as announced in the foregoing case. If the City was entitled to priority under the laws of Nebraska and Section 64b of the Bankruptcy Act applied to a municipal corporation, it would be a violation of the express provisions of that section to deny priority to the claim, rather than a violation of the purpose of the act by allowing it.

To summarize, we do not believe the respondent can now question the right of the surety to be subrogated to the City's priority because of the limitation contained in the order granting certiorari. But even if that question is considered the right to such priority attaches to the debt and if the surety paid the City, then the surety would acquire the same rights as the City had.

CONCLUSION.

The language used in Section 64b shows an intention to give all debts the same priority which they would have received under the laws of a state or of the United

States and to construe this section to exclude a municipal corporation would be an unjust and unfair discrimination. If Section 64b is construed to apply to a municipal corporation then under the authorities cited in our original brief, the City's claim is entitled to the priority accorded a sovereign at common law. No sound reason has been given by respondent why such right of priority was not included in the common law as adopted by the statutes of Nebraska.

A reasonable construction of Section 64b and a logical application of that section entitles the claim of the City to the priority it would have received under the statutes of Nebraska.

Respectfully submitted,

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CHARLES ELMORE

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONERS,

V.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ALLEN W. FIELD,
R. A. BOEHMER,
PERRY W. MORTON,
Counsel for Respondent.

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ALLEN W. FIELD,
R. A. BOEHMER,
PERRY W. MORTON,
Counsel for Respondent.

To the Honorable Justices of the Supreme Court of the United States:

STATEMENT OF CASE.

We desire to amplify the petitioner's statement of facts in the following particulars:

The money paid by the claimant was never carried on the books of the Trust Department of the bankrupt, but was carried on its general ledger account (p. 71 Rec.). The funds were placed in the general bank account, and never thereafter segregated nor transferred to the trust account (p. 73 Rec.).

The lowest general account balance on hand by the bankrupt after the City's funds were received and prior to the adjudication in bankruptcy was on July 8, 1932, being the day preceding the adjudication, and was in the sum of $628.63 in the bank account, and purported cash items of $1,599.00, which later sum included $599.00 (pp. 72 and 81 Rec.) in cashier's cage, and the rest consisted of checks and debit tickets, including a debit ticket in the sum of $1,000.00 to be charged to the expense account. This was not in fact cash, and there is nothing to show that it was ever afterwards collected as cash, and no showing that it was ever a part of the bank account.

The general bank account fluctuated from day to day, and deposits varied from five to fifty thousand dollars (p. 81 Rec.).

The bankrupt also received funds for which it issued receipts to various persons, which accounts were known as "Modern Investments" (pp. 73, 74 Rec.; Exhibit 2, p. 74 Rec.). These were in effect installment contracts for the purchase of real estate mortgage bonds. The largest amount in this account was on September 25, 1928, at which time it amounted to $114,418.00, and there was less after September 26, 1928. The account fluctuated in the amount of $600.00 between September 26th and October 1, 1928. The lowest amount of such liabilities in this account prior to bankruptcy was on June 28, 1932, when

they amounted to $28,592.05. The money in these accounts was also carried in the general bank account of the bankrupt.

The bankrupt also received funds under agreements known as Eltelic contracts (Exhibit 3, p. 75 Rec.). These were in effect agreements by which the holder was to make monthly payments to the bankrupt, and the bankrupt agreed to pay insurance premiums due from the holders of the contracts. On September 26, 1928 (date of City's deposit), there was approximately $36,516.76 to the credit of holders of these contracts (p. 78 Rec.). The lowest amount of liabilities thereon was $18,910.25 on June 28, 1932. This money was also kept in the general bank account and was never transferred to the Trust Department and the amounts on both this account and the modern investment account fluctuated from month to month.

The bankrupt also had so-called investment accounts for which common receipts were issued with the agreement to purchase securities for the holders of the receipts (p. 78 Rec.). The highest amount in this account was $95,484.32 on August 24, 1931, and it also fluctuated from month to month. The lowest amount was on June 28, 1932, when it was $65,048.91. This money was also kept in the general account of the trust company, in which the company also kept all its own money and out of it paid expenses, costs of operation and other items.

Other items which were deposited in the general account of the bankrupt consisted of principal and interest payments due to bondholders in mortgages and paid in by the mortgagors, payments on collateral and commission notes, safe deposit box rentals, insurance premiums and

other such items (p. 79 Rec.). None of these funds were in any way related to the funds segregated in the separate Trust Department bank account.

The segregated account set up by the bankrupt on June 15, 1932, was of funds received by the bankrupt after April 7, 1932, by way of payments of principal and interest due from mortgagors to bondholders, and which had not been disbursed by the company, and also payments made on Eltelic accounts during that period (p. 82 Rec.).

By stipulation (p. 83 Rec.) it is shown that the Standard Accident Insurance Company paid the City $45,276.81, and City's claim was assigned to the insurance company. It is further stipulated that the said City of Lincoln is a municipal corporation governed under a Home Rule Charter.

On page 6 of their statement petitioners refer to the securities deposited with the Department of Trade and Commerce under Section 8-209 Compiled Statutes Nebr. 1929. Section 8-212 Compiled Statutes Nebr. 1929, in force at the time of the adjudication in bankruptcy, provides for the liability of this fund, and is as follows:

> "The fund deposited as provided in Section 9 (8-209) shall be primarily liable for obligations of such company as guardian, curator, executor, administrator, assignee, receiver, trustee, either by appointment of court or under will, and for depository of money in court, and shall not be liable for any other debt or obligation of the corporation until all other trust liabilities aforesaid have been discharged."

The amended claim (p. 10 Rec.) is based on a contractual trust liability. There is no allegation of a trust ex maleficio or any allegation of, or prayer for, priority of payment under Section 64b (7) of the Bankruptcy Act.

ARGUMENT.

The petitioners give four propositions as reasons on which they rely for issue of a writ of certiorari, followed by argument in the same sequence, which we desire briefly to answer.

I.

A Municipality is Not Given Priority By Section 64b (7) of the Bankruptcy Act.

Petitioners' first proposition is that the Circuit Court of Appeals decided an important question of federal law in construing Section 64b (7) of the Bankruptcy Act and that the question decided has never been directly passed upon by this court.

In their argument on page 13 it is asserted that the construction placed upon the section of the Act was erroneous, which seems to be the only ground, with reference to the first proposition, on which the writ is asked.

If no error appears in the decision of the Circuit Court of Appeals and it is not in conflict with other decisions, then it would seem to be axiomatic that the writ will not be granted. This leads to a discussion of the merits, to which petitioners devote a considerable portion of their argument.

The construction placed upon the section of the Act by the Circuit Court of Appeals is in conformity with other provisions thereof, and with constructions thereof by the courts.

Fundamentally, the Bankruptcy Act contemplates an equal distribution of assets amongst creditors.

International Bank v. *Sherman,* 101 U. S. 403, 24 L. ed. 866.

Wood v. *A. Wilbert's Sons,* 226 U. S. 384, 57 L. ed. 264.

Boese v. *King,* 108 U. S. 379, 27 L. ed. 760.

Cunningham v. *Brown,* 265 U. S. 1, 68 L. ed. 873.

Section 64 of the Bankruptcy Act is clearly an exception to the general intent of the Act as a whole, and will therefore be strictly construed. Priority in payment to any creditor or class of creditors will not be granted unless expressly given by the Act. The Circuit Court has properly applied the principles announced in *Davis* v. *Pringle,* 268 U. S. 315. This court therein passed on Section 64 of the Bankruptcy Act prior to the amendment of 1926, which amendment was passed partly to overcome the holding of the court in finding that the word "person" did not include the United States. The amendment changed the Act to read that the term "person" should include corporations, the United States, and the several states and territories. Congress therefore placed their own interpretation upon the word "person", and did not include therein municipal corporations or other political subdivisions of the government. As they were not specified, it must be concluded that no priority was intended.

Whether the word "corporation" as used in a statute includes a municipal corporation is a question that has been passed upon on numerous occasions by different courts. This court in *County of Sherman in the State of Nebraska* v. *Simonds,* 109 U. S. 735, holds that the word "corporation" does not include a county. Other cases supporting the rule are:

City of Dallas v. *Halford, et al,* (Tex. Civ. App.) 210 S. W. 725.

Carrollton Furniture Mfg. Co. v. *Carrollton,* 104 Ky. 525, 47 S. W. 439.

Donahue v. *Newberryport,* 211 Mass. 561, 98 N. E. 1081.

People v. *Rinaker,* 252 Ill. 266, 96 N. E. 987.

City of Cloquet v. *N. W. State Bank,* 172 Minn. 324, 215 N. W. 174.

Monroe Water Works v. *Monroe,* 135 Wash. 355, 237 Pac. 996.

Osborn County v. *Osborn,* 104 Kan. 671, 180 Pac. 233.

Atlanta v. *Smith,* 99 Ga. 462, 27 S. E. 696.

Rosenstock v. *N. Y.,* 91 N. Y. Supp. 737.

There are many cases holding that the word "person" does not include a municipality or political subdivision. Among them are:

McBride v. *Pierce County,* 44 Fed. 17.

Lowenstein v. *Evans,* 69 Fed. 908.

Scott v. *Frazier,* 258 Fed. 669.

In *Moscow Hardware Co.* v. *Colson,* 158 Fed. 199, the court in deciding whether the general word "corporation" included a political subdivision of the state in a garnishment statute quotes the following language with approval:

> "Yet the courts hold that the general word 'corporation' must be restricted to mean private or ordinary business corporations, and not extended to embrace municipal corporations or bodies politic and corporate. The words used in the statute of this state are 'persons' or 'corporations' in general terms."

In *State of Florida* v. *Peninsular Telephone Company,* 73 Fla. 913, 75 So. 201, the court construes a statute which prohibits a reduction in telephone rates "to any person or corporation" and also forbids "any undue or unreasonable preference or advantage to any person, cor-

poration, or locality." The court says: "A city or county, being governmental as well as corporate, is in its governmental capacity not a 'person or corporation' within the meaning and intent of the above provision of the statute."

The construction of the section is also consistent and in conformity with other provisions of the Act. Section 1 (6) defines corporations and is not broad enough, under the most liberal construction, to include a municipality. States are defined in Section 1 (24) which does not include municipalities.

Section 64a with reference to priority for taxes states:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality * * *."

It is seen that when Congress intended a municipality to have a priority for taxes it so specifically stated.

The construction of the section of the Act by Judge Gardner of the Circuit Court of Appeals in his opinion (p. 123 Rec.) and likewise his interpretation of the case of *Davis* v. *Pringle*, 268 U. S. 315, and the case of *Guarantee Title and Trust Co.* v. *Title Guaranty and Surety Co.*, 224 U. S. 152, is so clear and concise that further exposition of those cases is deemed unnecessary.

The decision on this proposition is also right on other grounds and reasons which were presented, but which the court did not deem it necessary to pass upon in the view they took of the case. We desire briefly to present the same.

The argument of petitioner is based upon the theory of the common law prerogative right of a sovereign to pri-

ority, in payment of its debt, and that such right is in force in the State of Nebraska by reason of a statute which, to a limited extent, adopts the common law of England and on the further theory that if the right exists in the State of Nebraska it also exists in the political subdivisions of the state, including a municipality.

Our first answer to this is that even were it conceded that the right existed in the State of Nebraska and was applicable under the Bankruptcy Act, even then it has no application to a municipality, as the right belongs to the state or sovereign itself, and cannot be delegated. An examination of the authorities shows that over a score of states have denied the right to political subdivisions, in many cases wherein the state itself was held to have such right. Cases so holding are as follows:

Hammons v. *U. S. F. & G. Co.*, 30 Ariz. 480, 248 Pac. 1086.

U. S. F. & G. Co. v. *McFerson*, 78 Colo. 338, 241 Pac. 728.

Lake Worth Inlet Dist. v. *First American Bank*, 97 Fla. 174, 120 So. 316.

Glynn County v. *Brunswick Terminal Co.*, 101 Ga. 244, 28 S. E. 604.

People v. *Home State Bank of Grant Park*, 338 Ill. 179, 170 N. E. 205.

Leach v. *Castana Savings Bank*, 201 Ia. 346, 207 N. W. 331.

Phillips v. *Yates Center National Bank*, 98 Kan. 383, 158 Pac. 23.

Farmers Bank v. *Bailey*, 221 Ky. 55, 297 S. W. 938.

Bignell v. *Cummins*, 69 Mont. 294, 222 Pac. 797.

Boone County v. *Cantley*, 330 Mo. 911, 51 S. W. (2d) 56.

County Com'rs. of Frederick Co. v. *Page,* 163 Md. 619, 164 Atl. 182.

In re Northern Bank, 148 N. Y. Supp. 70, 163 App. Div. 974, 212 N. Y. 608, 106 N. E. 749.

Cherry v. *Territory,* 17 Okla. 221, 89 Pac. 192.

City of Sturgis v. *Meade County Bank,* 38 S. D. 317, 161 N. W. 327.

U. S. F. & G. v. *Rainey,* 120 Tenn. 357, 113 S. W. 397.

Denson v. *Shaw,* (Texas) 62 S. W. (2d) 344.

San Miguel County v. *Peoples Bank,* 34 N. M. 166, 279 Pac. 60.

Re Valley Deposit Co., 311 Pac. 495, 167 Atl. 42.

U. S. F. & G. Co. v. *Carter,* (Va.) 170 S. E. 764.

Calhoun County Court v. *Mathews,* 99 W. Va. 483, 129 S. E. 399.

In re Waller, 142 Fed. 883 (Md., in Bankruptcy Proceedings).

Fidelity & Deposit Co. v. *Brucker,* (Ind.) 183 N. E. 668, 90 A. L. R. 167.

Petitioners cite one case which they contend is inconsistent with the above statement, that being the case of *City of Denver* v. *Stenger,* decided by the Circuit Court of the Eighth Circuit, and reported in 295 Fed. 809. As stated by Judge Gardner in his opinion in the instant case, that was a receivership, in a state court where the common law prevailed without statutory modification, and where the state court had therefore not passed on the question. Since that decision the Supreme Court of Colorado in *U. S. F. & G. Co.* v. *McPerson,* 78 Colo. 338, 241 Pac. 728, has held directly contra to the holding in the Stenger case.

We further state that the rule is not in force in the State of Nebraska. While the Supreme Court of the

state has not directly passed upon the question, a former Supreme Court Commission, operating under Section 27-224, Comp. St. Nebr. 1929, did directly pass on the question, in *State ex rel* v. *School District* (Neb. unreported), and held that the right does not exist and is not in force in the State of Nebraska. The opinion is extensively quoted from in the referee's opinion (Rec. p. 27), and also in the opinion of the district court (Rec. p. 44). Section 27-224, Comp. Stat. 1929, under which the commissioners were operating is as follows:

> "In all cases so assigned the Commission shall make full findings of fact, and conclusions of law arising from such facts, and an order or judgment disposing of the case. These findings of fact, conclusions of law and orders or judgments shall then be certified to the Supreme Court and, when the same shall have been approved and adopted by the Supreme Court, they shall be spread upon the records of the court and shall be a final disposition of such cases."

Re P. J. Potter's Sons, (D. C. Ky.) 143 Fed. 407, states as follows:

> "We can hardly doubt that any priority of payment allowed under Section 64b (5), so far as it is therein made to depend upon the 'law of the state' must be evidenced by some statutory provision or by a judicial rule so certainly established as to put it upon the level of a statutory enactment, and it is clearly incumbent upon the person who claims priority to show the existence of such law."

The decisions of the Commission are final judgments of the court and are usually considered as law of the state until such time as expressly overruled by the court itself.

Petitioners cite *Marshall* v. *New York,* 254 U. S. 380, in support of their contention. A municipality was not in-

volved therein, but the court held that the State of New York itself did have such right in conformity with the constitution, and a long line of decisions of the State of New York. It also appears that it was a case of receivership proceedings and not a bankruptcy proceeding.

The decision can also be sustained on the theory that the sovereign right to priority, even in such states where recognized, cannot be asserted after the title to the debtor's property has passed, either by sale, lien, or prior execution. This rule is announced in *City of Denver* v. *Stenger, supra; Southern Railway Co.* v. *Wilder,* (C. C. A. 5) 231 Fed. 933; *Watkins* v. *Alexander,* (C. C. A. 5) 283 Fed. 968; *Hayes* v. *Gibson,* (C. C. A. 3) 279 Fed. 812; *In re Devlin,* 180 Fed. 170, and also in innumerable decisions of the state courts.

It is also stated by this court in *Marshall* v. *New York,* 254 U. S. 380, as follows:

> "The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right."

That the Bankruptcy Act (Sec. 70) U. S. C. Title 11, Sec. 110, itself entirely divests the bankrupt of all interest in his property can no longer be disputed.

Isaacs v. *Hobbs,* 282 U. S. 734.
Straton v. *New,* 283 U. S. 318.
Mueller v. *Nugent,* 184 U. S. 1.
Metcalf v. *Barker,* 187 U. S. 164.

Not only the right of possession, but the title to the bankrupt's property is vested by operation of law in the trustee.

II.

The Relation of the Parties Was That of Debtor and Creditor, and Not One of Trusteeship.

Petitioner's second proposition states that the Circuit Court was in error in holding that no trust relationship existed between the parties; that the court decided an important question of general law in a way untenable and in conflict with the weight of authority. The question does not involve a principle of general law of public importance, as it is very improbable that a similar situation will ever again be presented for determination by the courts.

The statement that the decision on this point is erroneous again necessitates an examination of the merits.

An examination of the opinion (Rec. p. 118) gives ample reason and authority to sustain the finding of the court.

An examination of the original instrument shows it to be entirely inconsistent with a trust relationship.

1. The right to invest the fund is specifically given.
2. The nature of such investment is left indefinite.
3. The bankrupt was obligated to pay interest.
4. The fund was to be returnable upon demand.

If this instrument meant that the bankrupt was holding the money for future investment at the direction of the City, then why the provision for the payment of interest? If not, then could not the bankrupt have invested in any manner that it might see proper to do? Further, if the bankrupt was authorized to invest the money, how then could the fund be returned on demand? As shown by the court's opinion and by the record, the funds were placed

in the general bank account of the Trust Company, where they were left for approximately three and one-half years, and during all of that time the City collected its semi-annual interest from the bankrupt.

The decision of the Circuit Court of Appeals is amply supported by the authorities therein cited, and is also in harmony with the decisions of this court, among which is *Scammon* v. *Kimball,* 92 U. S. 362, where the court uses the following language:

> "Where the agreement is to pay interest the agreement is obligatory; but the fact that the depositary agreed to pay interest affords very strong evidence that the title to the money deposited passed out of the depositor by the act of making the deposit."

The rule is recognized by this court in *Manhattan Company* v. *Blake,* 148 U. S. 412, 37 L. ed. 504, and *Blakey* v. *Brinson,* 286 U. S. 258, 76 L. ed. 1089. In the first case the court uses the following language which is very apposite here:

> "The money, when so deposited, became the property of the plaintiff, and was credited by it to the Treasurer of the State in account, and was thereafter drawn by drafts made by the Treasurer of the State and sent to the plaintiff. If such money had been lost or stolen while in the hands of the plaintiff, the plaintiff, and not the state, would have borne the loss. The identical money received by the plaintiff from the Treasurer of the State was not to be returned to the Treasurer or paid to his drawee, or kept distinct from the other funds of the plainitff."

III.

Was a Trust Ex Maleficio Created?

The petitioners' third contention is that a trust ex maleficio resulted from the transaction, and that the decision

of the Circuit Court decided an important question of general law in a way untenable and in conflict with the weight of authority. It is doubtful whether this raises any question of great importance to the country at large, but in any event, the question was correctly decided by the Circuit Court.

At the outset, it will be noted that no constitutional provision or statute of the State of Nebraska, and no ordinance or charter provision of the City of Lincoln is cited which in any manner construes the act of the City in placing the money with the bankrupt, or of the latter in receiving the money, as being illegal or wrongful. Neither is any decision of the Supreme Court of Nebraska cited so holding. The case of *Gamble* v. *Daniel,* 39 Fed. (2d.) 447, is cited. The facts therein are not at all similar to those here involved, and the statement of the court that a trust company is not authorized to accept deposits in the State of Nebraska is merely incidental to its final decision, but in any event does not pass upon a transaction involving a situation similar to that in the instant case. Furthermore, it does not hold that funds received under contracts ultra vires the corporation will be impressed with a trust. Counsel cite no authority whatever for that proposition.

It is not our contention that the transaction constituted a bank deposit. Other means of contracting were legally available to the parties to effect the relation of debtor and creditor. It appears that the certificates were worded to negative the idea of a banking transaction. One of the express powers given trust companies by Section 8-206, Com. St. Nebr. 1929, is "6 * * * *to borrow money.*" The Circuit Court, with ample authority to support the conclusion, sustains this proposition, and holds that the transaction created a relationship of debtor and creditor.

This court follows the general rule that it will be presumed that all persons' acts are legal until the contrary is clearly shown.

On pages 26 and 27 of their brief petitioners contend that the transaction must fall into one of two classes, being briefly, either that of debtor and creditor or that of a trust relation, and if it is the first, then the acts constitute an attempt to create a bank deposit or an attempt by the bankrupt to borrow public funds for private use from the city treasurer, and it is further stated that in either event the transaction would be illegal.

In *Korbley* v. *Springfield Institute for Savings,* 245 U. S. 330, Mr. Justice Clark uses the following language:

> "There being no evidence to the contrary, we must adopt the assumption of ordinary life and of law that the trustees for the savings banks acted lawfully, within the limits of their powers * * *."

In the absence of any showing to the contrary, it will be presumed that the parties intended to act lawfully, and it necessarily follows that a relation of debtor and creditor was established by the transaction.

As before stated, the record is barren of any evidence establishing any wrongful intent or wrongful act on either the part of the City or the bankrupt. On the contrary, it appears that every precaution was used to make the transaction legal. Again, on page 28 they argue that to construe the acts of the parties as being legal would be unnatural. We believe the contrary is true.

The evidence shows that the money received from the City was placed in the general account where it was commingled with monies which had been received from various classes of investors and other customers to whom

brief specific reference has been made in our statement. If the spirit of the Bankruptcy Act is that equality is equity, why should the City, or more specifically, the bonding company, which for a consideration undertook the responsibility for the risk, be afforded a special advantage over the others who were equally unfortunate. In this connection we call the court's attention to the language of Mr. Chief Justice Taft in *Cunningham* v. *Brown*, 265 U. S. 1, 68 L. ed. 873, as follows:

> "It is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankrupt law. Those who were successful in the race of diligence violated not only its spirit, but its letter, and secured an unlawful preference."

This is true both as to petitioner's contention that an express trust existed and as to their alternative assertion that a trust ex maleficio arose.

IV.

Federal Courts Follow Federal Rules in Tracing Trust Funds.

Having failed to trace the purported trust funds, the petitioners' contention is that the Circuit Court erroneously refused to follow the construction by the Supreme Court of Nebraska of the Nebraska Constitution and Nebraska statutes and the holdings of the Supreme Court of Nebraska that trust funds may be recovered from an insolvent trustee upon proof of augmentation of funds in the hands of the trustee. Counsel then proceed with an attempt to show that by constitutional provision the district courts in Nebraska have chancery jurisdiction; that by statute the common law of England is in force in Nebraska; that in construing the common law of England our court holds that a mere showing of augmentation of

funds is sufficient to give a preference. Cases purporting to sustain the proposition are cited. An examination of the cases cited shows that they merely hold that where a state by statute has reiterated in such statute a principle of common law and such statute has been construed by the highest state court, that then the state court construction of such statute will be followed by the Federal Courts, which in no manner changes the rule of the Federal Courts that in the application of equitable principles and particularly in tracing trust funds, that the Federal Courts will follow their own rules of construction.

This long-established rule has not been changed by the late case of *Burns Mortgage Company* v. *Fried*, 292 U. S. 487, and *Marine National Exchange Bank* v. *Kalt-Zimmers*, ~~292~~ 293 U. S. 540. Both of these cases had to do with the construction of the Negotiable Instruments Act in states where the common law or law merchant had been specifically codified by the states.

The rule established in *Swift* v. *Tyson*, 16 Pet. 1, 10 L. ed. 865, and followed in *Mandel* v. *Burton*, C. C. A. 8, 292 Fed. 127, *John Deere Plow Company* v. *McDavid*, C. C. A. 8, 137 Fed. 802, and many other decisions are still in full force and effect.

If the principle contended for by counsel is followed to its inevitable conclusion, then the federal courts would *in all cases* be bound by state court decisions, as nearly all states have adopted the common law, mostly by general statute similar to that of Nebraska, and hence every decision of the state court when some common law right is involved would, according to the argument be a construction of a statute. The fallacy of the argument is apparent.

Even in Nebraska when a question of tracing trust funds of a national bank was involved, our court followed the Federal rule. *Central National Bank of Lincoln* v. *First National Bank of Gering,* 117 Neb. 161, 219 N. W. 894. The court uses the following language:

> "The alleged trust fund has to do with the assets of a national banking institution being administered by a receiver under the laws of Congress. * * * what are assets presents a federal question which necessarily must be determined by the national courts or by the rules approved by them."

If the Nebraska court is bound by the Federal rules of construction in a national bank receivership, being liquidated under the national banking laws, it naturally follows that it would also be bound by the application of Federal rules in the liquidation of any insolvent under the National Bankruptcy Act.

Petitioner's answer to this is that even if this is true, under Section 64b (7) they would be entitled to a priority as existing under a state law. We believe counsel has become confused, as Section 64 has to do with priorities due to *creditors.* If petitioners are entitled to payment of their claim under Section 64b (7) it must be on the theory that they are creditors, and if on the contrary, it is their contention that they are entitled to recover on the trust fund theory, then the petitioners are not creditors, but are simply taking that which belongs to them. Either a debtor and creditor relationship existed or a trust relationship. It must be one, not both.

This rule is recognized by counsel on page 26 of their brief, where they state:

> "However, any relationship created will fall into either of two classes, the first in which title to the

fund delivered passes and the second in which the title to the fund or its proceeds is retained by the transferor."

On this proposition the petitioners have at all times been inconsistent, as seeking priority on the sovereign right theory must necessarily be based on a creditor and debtor relationship.

In *Local Loan Company* v. *Hunt*, 292 U. S. 234, 78 L. ed. 1230, this court had occasion to pass upon the rights of parties under an assignment for wages, like assignments having been upheld by the Illinois courts. The matter arose in the particular case in bankruptcy proceedings, and this court, speaking through Mr. Justice Sutherland, states:

> "To the foregoing array of authority petitioner opposes the decisions of the Supreme Court of Illinois * * *. Undoubtedly, these cases hold, as petitioner asserts, that in Illinois an assignment of future wages creates a lien effective from the date of the assignment, which is not invalidated by the assignor's discharge in bankruptcy. The contention is that even if the general rule be otherwise, this court is bound to follow the Illinois decision, since the question of the existence of a lien depends upon Illinois law.
>
> "We find it unnecessary to consider whether this contention would in a different case find support in Section 34 of the Judiciary Act * * * since we are of the opinion that it is precluded here by the clear and unmistakable policy of the Bankruptcy Act."

In concluding, it is stated:

> "We reject the Illinois decisions as to the effect of an assignment of wages earned after bankruptcy as being destructive of the purpose and operation of the Bankruptcy Act."

We believe the instant case is governed by the rule above set forth.

CONCLUSION.

We respectfully submit that petitioners are not entitled to priority in payment of their claim under Section 64b (7) of the Bankruptcy Act, and that the holding of the Circuit Court of Appeals in this regard is correct. We do not believe that a question of grave national importance is involved. It is true that petitioners are asking this court to construe a provision of the Bankruptcy Act which does not appear to have been passed upon by this court since the amendment of 1926, but it is doubtful if this in itself raises a question over which this court will lend its jurisdiction, in view of the fact that the decision of the Circuit Court of Appeals is not in conflict with the decisions of any other circuit. In fact, no case is cited by petitioners of any Circuit Court of Appeals holding contra to the decision in the instant case. In arriving at the conclusion that a question of grave national importance is not involved it is in fact significant that the section of the Act in its application to a municipality has not been passed upon in any other instance so far as we are able to learn.

We do not believe that the holding of the court determining that the relationship of the parties was that of debtor and creditor will raise any question on which this court will grant the writ as the holding is in conformity with nearly the universal holding of all courts, and is not in error.

Respectfully submitted,

ALLEN W. FIELD,
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Counsel for Respondent.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONERS,

V.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT,
RESPONDENT.

BRIEF OF RESPONDENT.

A. W. FIELD,
R. A. BOEHMER,
PERRY W. MORTON,
Counsel for Respondent.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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IN THE

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Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY, PETITIONERS,

V.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT, RESPONDENT.

BRIEF OF RESPONDENT.

A. W. FIELD,
R. A. BOEHMER,
PERRY W. MORTON,
Counsel for Respondent.

SUMMARY OF ARGUMENT.

1. Section 64-b of the Bankruptcy Act does not include municipalities, and the Circuit Court of Appeals in so holding properly applied the rule established by this court in *Davis* v. *Pringle*, 268 U. S. 315.

2. The purported common law right of a sovereign to priority in the payment of its debts does not apply to a municipality or to a political subdivision of the state.

3. The sovereign right to priority cannot be asserted after the title to property of the debtor has passed to a receiver, or trustee in bankruptcy, and such right does not take precedence over rights of other creditors acquired prior to the assertion of the right.

4. The common law right of a sovereign to priority is not in force or effect in the State of Nebraska.

ARGUMENT.

We interpret the scope of the order granting the writ herein to cover any purported right of the petitioner to priority in the payment of its debt under Section 64-b of the Bankruptcy Act.

In deciding the cause the Circuit Court held that a municipality was not included within the purview of Section 64-b, and so holding, did not pass on other matters urged in opposition to the asserted right.

It is therefore our purpose to present our argument as stated in the summary, and as presented in the trial courts and in the Circuit Court of Appeals.

I.

Municipality Is Not Given Priority Under Section 64-b of the Bankruptcy Act.

Any priority given to creditors in bankruptcy proceedings must necessarily be found within the Act itself. These are fixed in Section 64 of the Act (U. S. C. A., Title II, Sec. 104), and the asserted right herein is under paragraph b(7) of the section, which provides:

"debts owing to any person who by the laws of the States or the United States, is entitled to priority; PROVIDED That the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

The clause commencing with the word "provided" was added by amendment in 1926, after this court decided *Davis* v. *Pringle,* 268 U. S. 315, wherein the government had asserted that the word "person" included corporations, and that the United States was a corporation within the meaning of the Act; and this court construed the Act to exclude the United States. Congress amended the Act specifically to include the United States and the several States and Territories.

Chapter I, Section 1 (U. S. C. A., Title II, Sec. 1) of the Act, gives the definition of words used, and states that unless inconsistent with the context, words shall be construed as therein set forth. In Subdivision 19 it is stated that the word "persons" shall include corporations, except where otherwise specified, and Subdivision 24 provides that the word "states" shall include the territories. Therefore, unless it was the intent of Congress that Section 64-b (7) (11 U. S. C. A. 104) should be inconsistent with the provisions of the Act, there was no necessity to define the words "persons" and "states", as these words already had been specifically defined. "Corporations" are also defined in (6) of Section I as follows:

"* * * 'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business con-

ducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument."

In neither the definition of corporation, person, or states, as set forth in Chapter 1, is a municipality included.

To include municipalities in Section 64-b (7), opposing counsel lift the word "corporations" bodily from the context, and then read it in the light of Chapter 1, Section 1 (6), and argue that a municipality possesses *some* of the attributes of "private corporations" and that the word *"some"* implies *"any"*. If Congress intended such result to follow, then why was it necessary to specifically mention the United States, States and Territories in Section 64-b, for they, too, possess *some* of the powers and privileges of private corporations? We are persuaded that the purpose of Section 1 (6) was to show beyond question that private quasi-corporations, such as joint stock companies, limited partnerships, and similar associations were to be included within the definition.

In every other provision of the Act wherein it was intended that a municipality was to be included it is specifically so stated.

In Section 64-a, the provision for the payment of taxes, the Act specifically says that the trustee shall pay taxes "due * * * to the United States, state, county, district or municipality." In Section 17 of the Act wherein certain debts are excepted from discharge, the Act specifically recites those which "are due as a tax levied by the United States, the state, county, district or municipality." Section 57 covering the proof and allowance of claims, in paragraph J, provides "debts owing to the United States, a state, a county, a district or a municipality; as a penalty or forfeiture shall not be allowed * * *."

It will be presumed that Congress had in mind the other provisions of the Act when amending Section 64, and it must be concluded that Congress had in mind a municipality was named in other provisions of the Act, and this must certainly be true in view of the fact that in Section 64 itself in the matter of the payment of taxes a municipality is specifically named. It must also be presumed that at the time the amendment was adopted Congress had in mind the decision of the court in *Davis* v. *Pringle*, *supra*, where a literal construction was given to that section of the Act.

It is true that courts have held that the Bankruptcy Act as a whole will be liberally construed. However, the general intent of the Act is that there shall be a ratable distribution of the assets of the bankrupt amongst creditors, and where any provision of an Act is contrary to the general intent thereof such provision should be and will be strictly construed. The priority provision of the Act is in direct opposition to the general intent thereof.

Where fundamental principles or the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness to induce a court to support a design to effect such object.

The reasoning of Mr. Justice Holmes in *Davis* v. *Pringle* is of as much force in its application to the instant cause as it was to the claim of the United States in the cited case, wherein it was held that the original section was adopted with the United States in view, as it had ordered taxes due to the United States to be paid and naming the United States in that provision. This is the identical situation which presents itself in the instant case, and in fact, the language of the court in *Davis* v. *Pringle* could be paraphrased to fit the case at bar exactly. In

view of this fact, the Circuit Court of Appeals could not have held other than it did without in effect attempting to overrule the decision of this court in the *Davis* case.

In an attempt to avoid the explicit classification of creditors therein contained, counsel for petitioners assert that the emphasis of Section 64-b (7) is upon *debts* owed instead of upon the classes of *creditors.*

The distinction cannot be sustained, as the Act says:

> "Debts owing to *any person who* * * * *is* entitled * * * to priority,"

and then proceeds to define classes of creditors and not debts.

They also forget, at least temporarily, that the entire burden of their argument is predicated upon the alleged peculiarity of the type of *creditor* involved instead of upon any peculiarity in the kind of the debt. In fact, the debt involved herein is in no manner different than other debts.

If, as petitioners contend, Congress was not concerned with the question as to whom the debts were owed, then why was it necessary at all to name classes? It would have been much simpler to have said "all debts given priority by the laws of the States or the United States shall be given priority hereunder."

The only conclusion to be reached is that it was intended that certain classes of creditors were to have priority in the payment of their claims provided such creditors were given such priority by law. Having specifically named the classes to which such priority would be granted, the same will not be extended by the courts.

The petitioners cite authority that the words "person" and "corporations" may include a state and may in certain cases include the United States. It is conceded by petitioner that the interpretation depends upon the connection in which the particular word is used. However, as this court in *Davis* v. *Pringle* definitely construed the provision of the Bankruptcy Act as not including the United States, and as Congress amended the section with the court's definition in view, it would appear unnecessary to look to other authority for a definition of the words used in the section.

It is not difficult to find decisions holding that municipal corporations are not included within the word "person" or corporation in certain statutes. In *County of Sherman* v. *Simonds,* 109 U. S. 735, this court held that the word "corporation" did not apply to a county. *City of Dallas* v. *Halford, et al.,* (Tex. Civ. App.) 210 S. W. 725, holds the word "corporation" does not embrace municipalities. The case cites a large number of authorities supporting the rule, including that of *Sherman County* v. *Simonds, supra,* and that of *Bloomfield* v. *Charter Oak Bank,* 121 U. S. 121, and *East Oakland* v. *Skinner,* 94 U. S. 255. *C. O. Pick Co.,* (D. C. Ore.) 9 Fed. (2d) 207, construed Section 64-b before the amendment and holds that a state industrial commission is not a corporation, although such commission had many characteristics of a corporation, and had been held to be such by the state court. Other cases supporting the rule are:

Carrollton Furniture Manufacturing Co. v. *City of Carrollton,* 104 Ky. 525, 47 S. W. 439.

Donahue v. *Newburyport,* 211 Mass. 561, 98 N. E. 1081.
People v. *Rinaker,* 252 Ill. 266, 96 N. E. 987.
City of Cloquet v. *N. W. State Bank,* 172 Minn. 324, 215 N. W. 174.
McBride v. *Board of Commissioners,* 44 Fed. 17.
Berton v. *All Persons,* 176 Cal. 610, 170 Pac. 151.
Monroe Water Works v. *Monroe,* 135 Wash. 355, 237 Pac. 996.
Atlanta v. *Smith,* 99 Ga. 462, 27 S. E. 696.
Osborne v. *Osborne;* 104 Kan. 671, 180 Pac. 233.
Whitaker v. *Toulumne,* 96 Cal. 100, 30 Pac. 1016.
State v. *Rich,* 126 Md. 643, 95 Atl. 956.
Divine School District v. *Koehler,* 212 S. W. 238.
Rusk Farm Drainage District v. *Industrial Commission,* 186 Wis. 232, 202 N. W. 204.
Rosenstock v. *New York,* 91 N. Y. Supp. 737.
Moscow Hardware Co. v. *Colson,* 158 Fed. 199.
State of Florida v. *Peninsular Telephone Co.,* 73 Fla. 913, 75 So. 201.

Petitioner cites other cases holding that statutes will be construed to avoid unnecessary hardship. In the instant case there is nothing in or outside the record that discloses that any hardship will follow by adherence to the decision of the Circuit Court. Failure to give the insurance company priority over other creditors certainly causes no hardship, but on the contrary, prevents injustice and inequity.

Theoretically it may be true that the Act discriminates against a municipality, but discrimination and hardship are entirely different matters, and mere discrimination will not justify a court to construe a statute contrary to the plain provisions thereof.

The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A casus omissus does not justify judicial legislation.

Ebert v. *Poston,* 266 U. S. 547.

United States v. *Weitzel,* 246 U. S. 533.

State ex rel v. *School District,* 99 Neb. 338, 156 N. W. 641.

Rusk Farm Drainage Company v. *Industrial Commission,* 186 Wis. 232, 202 N. W. 204.

II.

Sovereign Priority Right Does Not Apply To a Municipality.

It is not our purpose to enter into a lengthy discussion of the general question of the right of a sovereign to priority in the payment of its debts. The decisions on the question and discussions thereof are innumerable, and are in hopeless conflict.

Learned discussions of the rule may be found in annotations contained in 90 A. L. R. 184; 51 A. L. R. 1355; 65 A. L. R. 1331.

An interesting discussion, concisely stated, can be found in 47 Harvard Law Review, commencing on page 841. In part the author states:

> "The recent wave of bank failures has served to revive interest in the old, yet still unsettled problem of the priority of the state in the assets of its debtors. Although once well established, the theory that the claims of the government stand ahead of all others as a matter of sovereign right has, to a certain extent, been undermined either by direct

reversal of the rule, or by indirect delimitation of its application. Despite the great mass of precedent which has accumulated over the years, the question is still litigated today as frequently as the ingenuity of counsel is able to devise a legalistic distinction that may give an excuse for its reappearance. The layman viewing the intensely practical question of a reduced dividend or the impediment of a reorganization may well be awed at the usual answer propounded by the courts. He is apt to find a learned discussion of the English common law prior to the reign of James I.

"The initial step of the usual judicial approach is to refer to the constitutional or judicial adoption of the common law and statutes of England. Then will appear citations from Coke on Littleton, and the statute 33 Henry VIII, followed by a discussion of the difference between the personal and incidental prerogatives of the English King. In many cases, the decision will be that the state as the representative of the people, has succeeded to the royal right. Some jurisdictions have in due course codified this rule. Other cases, however, have with equal facility quoted from Kent's Commentaries and found the prerogative of the Crown repugnant to the theory of democratic government. Although these standardized opinions continue to appear, in recent years some courts have apparently recognized the futility of an extended common-law analysis, contenting themselves with the citation of a paragraph of authority on each side, and a statement that the reasoning of one or the other line of decisions seems the better. The result is a fairly even conflict in the cases, for while most of the earlier decisions granted the preference, the later ones have shown a trend in the opposite direction.

"That the prerogative is not considered as favorably today as formerly may indicate a recognition by the

courts that the burden of the common loss should not be borne by particular individuals, but should rather be distributed equally among all through taxation. This feeling is discernible not only in the growing tendency to deny the state priority altogether, but also in the persistency with which those courts which have accepted the doctrine on grounds of stare decisis have seized upon its archaic limitations and upon all conceivable distinctions afforded by pertinent legislation to confine its application to the narrowest possible limits. The almost unanimous group of decisions refusing to extend a preference to the political subdivision of the state may be regarded as the initial indictment of a policy difficult to pursue to its logical conclusion, although the formal ground relied upon has been that the prerogative is an indivisible sovereign right lodged only in that political body representative of all the people. Only an occasional opinion has declared that the necessities of municipal government fall within the reason for the state's preference."

In the note to the above article the author states that in approximately nine states the right is still recognized, while in sixteen states it is denied. We have not verified this statement.

On page 846 the author further states:

"Despite the wide divergence of result apparent in most situations involving the claim of the state to priority, the cumulative effect of all the decisions unquestionably indicates a growing regard for the hitherto neglected general creditor."

In *Davis* v. *Pringle, supra,* Mr. Justice Holmes states:

"Public opinion as to the peculiar rights and preferences due to the sovereign has changed."

Again Mr. Justice Holmes in speaking for the court in *White* v. *Mechanics Securities Corporation,* 269 U. S. 281, states:

> "There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past, and it may be that the enactment was intended to exhibit the self-denial that, whether intended or not, was achieved in the Bankruptcy Act in regard to the priority of liens."

In earlier decisions by this court it was indicated that the United States acquired part of the royal prerogatives of the Crown. *The Dollar Savings Bank* v. *The United States,* 86 U. S. 227. In *United States* v. *Herron,* 87 U. S. 251, it is indicated that the United States by reason of its sovereignty is not bound by any statute unless specifically named, and that for this reason debts due to the United States were not discharged by the Bankrutcy Act then in force.

A learned discussion of the rule can also be found in *Fidelity and Deposit Company* v. *Brucker,* 183 N. E. 668, 205 Ind. 73, 90 A. L. R. 167, preceding the annotation hereinbefore referred to.

As the rights of a state are not here involved, but those of a municipality or its assignee, we will confine our discussion, insofar as possible, to that particular phase of the matter. This question has also been annotated in A. L. R., and in addition to the notes above referred to, others specifically applying the rule to political subdivisions of a state may be found in 36 A. L. R., page 640, and 52 A. L. R., commencing on page 754. An examination of these annotations and all other sources of information and digests *discloses that no case can be found in which a municipality was given priority over other*

creditors in bankruptcy proceedings based on a sovereign prerogative right to such priority. On the contrary, it is shown that in more than a score of states the courts have held that the political subdivisions of the state do not have any such priority under any circumstances, and the courts hold that this is true in many instances, although the state itself was held to have such right. Part of the cases denying the right are as follows:

Aetna Casualty Co. v. *Bramwell,* 12 Fed. (2) 307 (D. C. Ore.).

Hammons v. *U. S. F. & G. Co.,* 30 Ariz. 480, 248 Pac. 1086.

U. S. F. & G. Co. v. *McFerson,* 78 Colo. 338, 241 Pac. 728.

Lake Worth Inlet Dist. v. *First American Bank,* 97 Fla. 174, 120 So. 316.

Glynn County v. *Brunswick Terminal Co.,* 101 Ga. 244, 28 S. E. 604.

People v. *Home State Bank of Grant Park,* 338 Ill. 179, 170 N. E. 205.

Leach v. *Castana Savings Bank,* 201 Ia. 346, 207 N. W. 331.

Phillips v. *Yates Center Nat. Bank,* 98 Kan. 383, 158 Pac. 23.

Farmers Bank v. *Bailey,* 221 Ky. 55, 297 S. W. 938.

Bignell v. *Cummins,* 69 Mont. 294, 222 Pac. 797.

Boone County v. *Cantley,* 330 Mo. 911, 51 S. W. (2d) 56.

County Com'rs. of Frederick Co. v. *Page,* 163 Md. 619, 164 Atl. 182.

Re Northern Bank, 148 N. Y. Supp. 70, 163 App. Div. 974, 212 N. Y. 608, 106 N. E. 749.

Cherry v. *Territory,* 17 Okla. 221, 89 Pac. 192.

City of Sturgis v. *Meade County Bank,* 38 S. D. 317, 161 N. W. 327.

U. S. F. & G. Co. v. *Rainey,* 120 Tenn. 357, 113 S. W. 397.

U. S. F. & G. G. Co. v. *Centropolis Bank,* 17 Fed. (2) 301.

Denson v. *Shaw,* (Tex. Civ. App.) 62 S. W. (2d) 344.

San Miguel County v. *Peoples Bank,* 34 N. M. 166, 279 Pac. 60.

Re Valley Deposit Co., 311 Pa. 495, 167 Atl. 42.

U. S. F. & G. Co. v. *Carter,* — Va. —, 170 S. E. 764.

Calhoun County Court v. *Mathews,* 99 W. Va. 483, 129 S. E. 399.

In re Waller, 142 Fed. 883 (Md.) (In Bankruptcy Proceedings).

Reichert v. *Plymouth United Savings Bank,* 269 Mich. 136, 256 N. W. 831.

Montgomery v. *City of Athens,* 155 So. 551.

In re Franklin Savings & Trust Co., 316 Pa. 125, 173 Atl. 288.

The reasoning of the courts in arriving at the conclusion that the prerogative right does not extend to a municipality or any other political subdivision of a state is set forth in a scholarly manner in *Bignell* v. *Cummins,* 69 Mont. 294, 222 Pac. 797, 36 A. L. R. 634:

> "Sovereignty must involve the general interest of the state at large. It is true that the whole state has an interest in the proper administration of its laws everywhere within its borders, and so it has an interest in the proper government of every county, and so it has in every municipality and in the conduct of every school district and in the prosperity

of every citizen. But while the prerogative of the state may be involved for the protection of the rights of the county, municipality, school district and citizen, it does not follow that any of these possess that power. It must be held that the sovereign right, the prerogative, is lodged in the political power which is created by and is the representative of all the people—the state itself, and that the prerogative of the state may not be exercised by its creature in the absence of express authority granted to the creature."

In *Glynn County* v. *Brunswick Terminal Co.*, 101 Ga. 244, 28 S. E. 604, the court says:

"While it may be true that the state, on account of its prerogative right, has this preference, we cannot hold that the same right applies to the counties of the state. We have no statute which gives a county which is a depositor in a bank a lien or preference over other depositors of the same class."

We also quote from *Calhoun County Court* v. *Mathews*, 99 W. Va. 483, 129 S. E. 399, as follows:

"The sovereignty of the King was a united, entire, and indivisible sovereignty. We find no case under the common law conceding sovereignty to a political division or municipality of England."

Sloan Ship Yards Corp. v. *United State Shipping Board*, 258 U. S. 548, 66 L. Ed. 762, holds that the United States Shipping Board Emergency Fleet Corporation was not entitled to preference in payment of a claim against a bankrupt, although all the stock of the corporation was owned by the United States, and it had been given a large number of governmental powers and irrespective of the fact that it was an arm and agency of the United States. It was held to be a separate entity not having the statutory priority right held by the United States.

Reichert v. *Dillman,* 249 N. W. 625, 264 Mich. 182, holding that a priority cannot be asserted by a state highway department.

In the recent case of *Ghinger* v. *Pearson,* 168 Atl. 105, — Md. —, the Court of Appeals of Maryland holds that a statute of the state giving municipalities the right to withdraw funds from banks while such banks were closed during the banking holidays, was invalid as being in violation of the Constitution of the state guaranteeing equal protection to all persons, and that the law cannot be sustained under the police power as emergency legislation.

The petitioners cite several cases which they contend support the theory that the priority may be asserted by a political subdivision of a state. The first of these cases is *In re Worcester County,* 102 Fed. 808, (1 C. C. A., 1900). The claim was for a balance due for the hire of prisoners. The priority was based on a specific statute of Massachusetts which awarded priority to all debts due to the state, county, city, etc. The claim to priority was not based on the sovereign right theory. It seems to have been conceded that the county was a corporation.

Another case cited is *City of Denver* v. *Stenger,* 295 Fed. 809. This was a receivership proceeding, and no construction of Section 64 of the Bankruptcy Act was involved. The Supreme court of the state had not as yet passed upon the question of the prerogative right of the city. Since that decision the Supreme Court of Colorado in *U. S. Fidelity and Guaranty Co.* v. *McFerson,* 78 Colo. 338, 241 Pac. 728, has specifically held against the right.

The only other cases cited by petitioners at all bearing on the question are those of *Marshall* v. *New York*, 254 U. S. 380, *In re Almanac Co.*, 42 Fed. (2) 120, and *State of Oregon* v. *Ingram*, 63 Fed. (2) 417. The Marshall case was also a receivership proceeding in which the state itself claimed priority, and hence would have no application to the instant case involving the rights of a municipality in a bankruptcy proceeding. The other cases will be discussed later.

Authorities are cited by petitioners that a city is an agency of the state. Broadly speaking, this is no doubt true, as it is also true that as such agency the municipality has only such powers as are expressly given, or implied, as being essential to carry into effect the powers expressly granted.

Barnett v. *City of Dennison*, 154 U. S. 135.
City of Ottawa v. *Carey*, 108 U. S. 109.

It is stipulated that the City of Lincoln is governed by a home rule charter and it has been on numerous occasions decided by the Supreme Court of Nebraska that this was a grant of powers and not a limitation. *Consumers Coal Company* v. *City of Lincoln*, 109 Neb. 51, 189 N. W. 643, and *Standard Oil Co.* v. *City of Lincoln*, 207 N. W. 172, 114 Neb. 243, which latter case was affirmed by this court, 275 U. S. 504. It is not shown by the record as to the powers or rights granted to the municipality, and therefore to hold in favor of petitioners it would be necessary to assume first, that the priority right exists in the State of Nebraska, and second, that this power could be and was granted to petitioner, which we believe would be an improper pyramiding of presumptions.

It might also be of interest to distinguish between the rights of a city in its proprietary capacity and its governmental capacity, and determine whether a city when engaged in a purely commercial transaction of the kind here involved should be given priority in payment over the private citizen.

Henry v. *City of Lincoln,* 140 N. W. 664, 93 Neb. 331, 50 L. R. A. (N. S.) 174, holds that the City of Lincoln, while engaged in an ordinary business enterprise

> "is bound by all the rules of law and procedure applicable to any other private corporation or person engaged in a like enterprise. It has no greater or higher privileges or immunities than are possessed by any other private corporation. It is subject to the same liabilities and entitled to the same defenses, no more and no less."

This rule also applies to a state, *Davis* v. *Gray,* 83 U. S. 203, *Southern Railway Co.* v. *North Carolina Railway Co.,* 81 Fed. 600, *In Re Valley Deposit & Trust Co.,* 311 Pa. 495, 167 Atl. 42.

III.

Sovereign Right To Priority Cannot Be Asserted After Title To the Property of the Insolvent Has Passed.

It appears to be nearly the universal holding of the courts that the purported right to priority of the sovereign is lost unless the right is asserted prior to a transfer of the debtor's property for the benefit of creditors, either by assignment, the appointment of a receiver, or an adjudication in bankruptcy. In the instant case the petitioners originally filed a claim against the bankrupt as a general creditor, and it was so allowed.

Thereafter the allowance was set aside and an amended claim was filed, and even this claim did not assert priority on the sovereign right theory (Rec. p. 10), but was based entirely on the theory that the funds received by the bankrupt was a traceable trust fund.

The rule is supported in the cases most relied upon by petitioners, to-wit: *City of Denver* v. *Stenger,* 295 Fed. 809, wherein it is stated as follows:

> "The fourth contention, that the preference as sovereign is lost when specific liens exist in advance of the assertion of the preference by the sovereign is stated too broadly. This preference given by the common law was an inchoate right which attached only from and as of the time when it was properly claimed or asserted and did not affect or take precedence over liens which were fixed upon the property prior to that time and were then in force."

The court then cites with approval from *State of Wyoming* v. *Foster,* 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226-245, where it is stated that the right cannot be asserted after a general assignment for creditors.

In *Marshall* v. *New York,* 254 U. S. 380, also relied upon by petitioners, Mr. Justice Brandeis, speaking for the court, says:

> "The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right."

Further, the court says:

> "* * * the priority does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right."

The court refers to *City of Richmond* v. *Bird*, 249 U. S. 174, 63 L. Ed. 543, stating:

> "The city sought there in vain to have taxes declared payable out of the bankrupt's assets in preference to the claim of the landlord thereon, which was secured by a specific lien arising upon distraint. This court held that the city did not have such superior right, since neither the laws of the United States nor those of Virginia accorded such priority."

Other cases sustaining the rule that the priority of the state is lost by divesting of title or by appointment of a receiver are as follows:

State v. *Williams*, 101 Md. 529, 61 Atl. 297.

Zimmerman, Commissioner, v. *Chelsea*, 161 Mich. 691, 125 N. W. 424.

State of New Mexico v. *First State Bank*, 22 N. M. 661, 167 Pac. 3, L. R. A. 1918 A 394.

State v. *Carlyon*, 166 Wash. 498, 7 Pac. (2d) 572.

Aetna Casualty Co. v. *Moore*, 107 Wash. 99, 181 Pac. 40.

Public Indem. Co. v. *Page*, 161 Md. 239, 156 Atl. 791.

In re Devlin, (D. C. Kans.) 180 Fed. 170.

Middlesex County v. *State Bank*, 29 N. J. Eq. 268.

State v. *Peoples Savings Bank*, 23 N. M. 282, 168 Pac. 526.

Nat'l. Surety Co. v. *Pixton*, 60 Utah 289, 208 Pac. 878, 24 A. L. R. 1487.

Nat'l. Surety Co. v. *Morris*, 34 Wyo. 134, 241 Pac. 1063, 42 A. L. R. 1290.

Re Central Bank, 23 Ariz. 574, 205 Pac. 915.

That an adjudication in bankruptcy entirely divests the title of the bankrupt, and invests the trustee with the same, can no longer be doubted.

Section 70 (a) of the Act provides:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualifications, shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him;"

Section 47 (a) (2) provides:

> "* * * and such trustees, as to all the property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon * * *."

Isaacs v. *Hobbs*, 282 U. S. 734.
Mueller v. *Nugent*, 184 U. S. 1.
Stratton v. *New*, 283 U. S. 318.
Gross v. *Irving Trust Co.*, 289 U. S. 342.

Section 67 of the Act in effect sets aside or gives the trustee the benefit of attachments, executions, liens and conveyances of the bankrupt's property obtained within four months before the filing of the petition.

Section 67 of the Act was construed in *First National Bank* v. *Staake*, 202 U. S. 141, wherein it is held that any rights obtained by an attaching creditor may be preserved by the trustee in bankruptcy, but that the attaching creditor loses any individual rights obtained under the attachment. This rule is also sustained in *Globe Bank & Trust Company* v. *Martin*, 236 U. S. 285, wherein it is also held that the attaching creditor acquires no rights under Section 64-b of the Act notwithstanding the

fact that the attachment of the debtor's property originally gave him a preference over other creditors.

Under the plain provisions of the Act and the construction placed thereon by this court it would seem impossible to assert priority rights under the sovereign prerogative theory, as the sections above quoted make no exceptions and would therefore invalidate executions and attachments in favor of the sovereign.

We have heretofore referred to the cases *In re Almanac Operating Company,* 42 Fed. (2d) 120, and *State of Oregon* v. *Ingram,* 63 Fed. (2d) 412, cited by petitioners in support of the theory that the sovereign priority may be asserted in bankruptcy proceedings, and it is true that these two cases, standing alone, so hold. In the first case the holding is based on a claim of the State of New York, under the New York law, where it has been definitely established by judicial decision that the priority is in force. The question whether the right could be asserted after an adjudication in bankruptcy is neither raised nor passed upon.

In the second case, the *Ingram case,* the claim is also based on a debt due to the state, and the question whether it can be raised in bankruptcy proceedings, is passed upon, and it is held therein that it can be. The decision is based on the theory that the adjudication in bankruptcy did not pass the title to the property of the bankrupt to the trustee. Under the many holdings of the courts and under the plain provisions of the Bankruptcy Act itself, we believe that this latter case is in error in this regard.

IV.

The Common Law Priority Right is Not in Force in the State of Nebraska.

The petitioners' contention is, and of necessity must be, based on the theory that the right to priority exists in the State of Nebraska by reason of the fact that Nebraska adopted the common law of England except where inconsistent with other laws of the state. The statute is quoted on page 26 of their brief, and we refrain from repeating the same. This provision of the statute has been before the Supreme Court of the State of Nebraska on several occasions and in nearly every instance the court has found it ineffective, for one reason or another.

Williams v. *Miles,* 62 L. R. A. 385, 62 Neb. 566, 87 N. W. 315:

> "The term 'common law of England,' as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or civil law system, which was in force in this territory prior to the Louisiana Purchase. Hence, the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system."

In re Grainger's Estate, 237 N. W. 153, 121 Neb. 338.

In *Brooks, et al.* v. *Kimball County,* 127 Neb. 645, 256 N. W. 501, decided by the Nebraska court on September 21, 1934, the court says:

> "* * * this state adopted the common law of England and not the statutory law of England."

The second syllabus is as follows::.

> "Statute adopting common law of England held not to include adoption of statutory law of England, or of common law as modified by statute."

Moran v. *Moran, et al.*, 101 Neb. 386, 163 N. W. 315, holds that the rule in *Shelley's Case* is not in force in the State of Nebraska.

Farmers & Merchants Insurance Company v. *Jensen*, 58 Neb. 522, 78 N. W. 1054, 44 L. R. A. 861, holds that the statute of uses is not in effect in Nebraska, and after quoting the Nebraska statute, says:

> "In terms and ordinary import, the foregoing appears to be of 'the common law of England,' and not of the statutory laws, or of the former as modified by the latter."

Delaney v. *Errickson*, 10 Neb. 492, 6 N. W. 600, holds that the principles of the common law with reference to trespass by animals is not in force in Nebraska.

Wattles v. *South Omaha Ice Company*, 50 Neb. 251, 69 N. W. 785, holds that the common law construction of a lease covenant to return the property in the same condition, etc., which makes the tenant liable in case of destruction of the premises by fire, is not in force in Nebraska.

Bloomfield State Bank v. *Miller*, 55 Neb. 243, 75 N. W. 569, 44 L. R. A. 387, holds the doctrine of equitable mortgages by the deposit of title deeds, although a part of the law of England, is not the law of Nebraska.

An exhaustive search of the authorities fails to reveal whether the sovereign theory was originally based on an English statute or purely on the common law; probably

the latter is correct. However, it appears from the various citations that the right was modified by statutes of England. See *U. S. F. & G. Co.* v. *Bramwell,* 108 Ore. 261, 217 Pac. 332, which refers to statute of 25 Edward III.

In re Carnegie Trust Co., 206 N. Y. 390, 99 N. E. 1096, 46 L. R. A. (N. S.) 260, refers to statute of 33 Henry VIII.

Fidelity and Deposit Company v. *Brucker,* 205 Ind. 73, 183 N. E. 668, 90 A. L. R. 167, uses the following language:

> "No specific rule of the common law (nor any statute) existed in 1607 by which the sovereign could claim a priority in the case of a bank deposit; the Bank of England, the first institution through which the government did a banking business, was not founded until 1694. It does not follow from the general rule of the common law, giving a preference to the sovereign in governmental matters, that such a preference should exist where the state deposits money in a bank to earn interest, pursuant to a contract."

Counsel state that the direct question involved herein has not been passed upon by the Supreme Court of the State of Nebraska. Technically speaking, this is true. However, the Supreme Court Commission of the State of Nebraska on June 16, 1931, filed an opinion in the case of *State of Nebraska ex rel.* v. *S. S. Hadley Co.,* which did pass directly on the question. A complete copy of this opinion, with the order of the Supreme Court approving it and the statute under which the Commission acted, are set forth in the appendix to this brief.

Irrespective of the fact that the commissioner's opinion does not, under the statute, constitute a precedent for other decisions, it is a judgment of the Supreme Court and, we believe, considered the law of the state until overruled by an express opinion of the court itself, and

in the words of the District Court, we consider it persuasive of what the rule is in Nebraska until the court itself holds otherwise.

Re P. J. Potter Sons, (D. C. Ky.) 143 Fed. 407, states as follows:

> "We can hardly doubt that any priority of payment allowed under Section 64-b (5), so far as it is therein made to depend upon the 'law of the state' must be evidenced by some statutory provision or by a judicial rule so certainly established as to put it upon the level of a statutory enactment, and it is clearly incumbent upon the person who claims priority to show the existence of such law."

The only statute in Nebraska with reference to the distribution of the assets of a defunct trust company is Section 8-212, C. S. Neb. 1929, which provides that funds deposited with the Department of Trade and Commerce under Section 8-209 of the statute shall be primarily liable for obligations of the company while acting as guardian, executor, and other trusteeships by appointment of court or under a will, and provides that this fund shall not be liable for other debts of the company until the liabilities referred to have been first discharged.

There are other provisions of the Nebraska Compiled Statutes of 1929 which in several instances fix priorities of debts of insolvents, instances being as follows:

Decedents' Estates, Sec. 30-615;

Assignments for Benefit of Creditors, Sec. 6-124; and

Defunct State Banks, Sec. 8-1102,

which provides that the claims of depositors for deposits, *"not otherwise secured,"* and claims of holders of exchange shall have priority over other claims, excepting taxes. In none of the statutes referred to is the State

of Nebraska given any priority in the payment of debts due to it. Other Nebraska acts which tend to show that the state claims no sovereign rights of the nature herein contended for, are as follows:

The state may be sued.
Const. of Neb., Art. V, Sec. 22;
Sec. 27-342;
Sec. 27-325.

The state is liable for costs,
Sec. 27-328,

and is generally barred by the statute of limitations.
Sec. 20-218.

Its judgments are collected the same as other judgments, Sec. 27-330.

Section 77-2601 confers upon public officers the right to bring suit to recover public funds loaned or deposited, and grants no priority to such recovery.

It is seen that Nebraska has at no time assumed any right of priority in the payment of its debts except for taxes.

In *State of Alabama* v. *Martin,* (C. C. A. 5) 256 Fed. 313, it is held that the priority laws of Alabama, being almost identical with those of Nebraska, do not grant the state a priority, holding that if the state wished such priority it would have provided so by statutory provision, and in the absence thereof the priority does not exist.

Nebraska has had its share of bank failures, and numerous cases involving an asserted right to priority by political subdivisions have been passed upon by the court. Except in the one case decided by the Commission,

the sovereign right theory has never been asserted, but the right has always been based on the trust fund theory.

Instances of attempts made to assert priority are as follows:

State ex rel. Sorensen v. *First State Bank,* 122 Neb. 109, 239 N. W. 646,

wherein a surety company for a city, holding security for its deposit asserted a right to priority, claiming that it should be on the same basis as other depositors, and the court held that the claimant was "otherwise secured," and that it was not entitled to the same priority as other depositors. There are several other cases along the same line and holding the same.

State v. *Omaha National Bank,* 128 Neb. 733, 260 N. W. 278.

State v. *F. & M. Bank,* 252 N. W. 917, 126 Neb. 245.

State v. *F. & M. Bank,* 253 N. W. 652, 126 Neb. 509.

If the Nebraska rule for the distribution of the funds of a defunct bank are applied to the instant case, then the claim of the petitioner would in fact be subsequent to other general creditors for the reason that the claim was otherwise secured.

It appears at least unusual that if the prerogative right exists in Nebraska it has never been asserted except in the one cited instance during all of the sixty-five years of judicial history of the state. In the words of various courts, we believe it is proper to say that "a prerogative which has remained so long practically useless can hardly be said to exist."

It is a cardinal principle of law that where the reason for a rule fails, then the rule will fail. The sovereign

prerogative to priority was based on the theory that public funds must be preserved. *U. S.* v. *Bank of North Carolina,* 6 Pet. 29, 8 L. Ed. 308. The reason for this rule fails in a case where the funds have been protected by a bond or insurance, as in the instant case. *U. S. F. & G. Co.* v. *McFerson,* 78 Colo. 338, 241 Pac. 728; *Brown* v. *American Bonding Co.,* 210 Fed. 844 (C. C. A. 9). To give the bonding company, which assumed a risk for compensation, priority in payment of its claim over general creditors, does certainly violate the spirit of the bankruptcy law, and under the rule of this court, as stated in *Local Loan Company* v. *Hunt,* 292 U. S. 234, 78 L. Ed. 1230, the court would be justified in denying the priority even though the state itself had by definite law given such priority.

CONCLUSION.

We conclude that under the plain language of Section 64-b (7) of the Bankruptcy Act a municipality was not intended to be, and was not, included;

That the prerogative right to priority in payment of debts is purely a sovereign right, and does not extend to municipalities;

That the right to priority cannot be asserted by the sovereign after title to the debtor's property has been divested;

That the common law right of priority of the sovereign is not in force in the State of Nebraska.

Respectfully submitted,

A. W. FIELD,
R. A. BOEHMER,
PERRY W. MORTON,
Counsel for Respondent.

APPENDIX.

State of Nebraska, ex rel.
O. S. Spillman,
Attorney General,
V.
S. S. Hadley Company, Bankers,
and R. O. Brownell, Receiver,
School District No. 6 of
Boone County, Intervener.
#27751 Filed June 16, 1931.

Wilson, C.

This is an action in equity, brought November 20, 1929, to impress the money in the hands of the receiver of the S. S. Hadley Company, Bankers, and the Guarantee Fund Commission, with a trust in favor of School District No. 6 of Boone County, in the sum of $1767.26, the amount of school district money in the bank when the receiver took charge. The petition prayed that it be decreed that the school district have a first and paramount lien on the money in the hands of the receiver in the amount of $1767.26, with interest at 7% from November 19, 1926.

The receiver answered, admitting certain allegations of the petition and alleged that on July 9, 1928, the school district filed its claim in the receivership; that on August 8, its claim was classified "as a preferred claim payable out of the Guarantee Fund," which classification was accepted by the school district; and that the classification and judgment entered by the court on August 8, 1928, are now res adjudicata.

Replying to the answer of the receiver as to classification of the school district's claim as a preferred claim, the school district alleged there was no adjudication or attempt to adjudicate the school district's rights to have the general funds of the bank declared a trust with respect to such funds as had been deposited in the name of Paul Roberts, treasurer of the school district, and subjecting the funds with a trust in favor of the school district.

On August 13, 1930, the court found the school district was not entitled to a trust fund and not entitled to be

paid out of the assets of the bank prior to the payment of other depositors; and that the general classification heretofore made of its claim should be confirmed and its claim paid out of the assets of the bank as the claims of other depositors are paid. The school district asserts as error that the decision of the court is contrary to the principles of law and equity.

The school district had a checking and deposit account in the bank in the name of "Paul Roberts, treasurer District No. 6," from July 15, 1926, to June 3, 1927. At the time the bank was taken over by the Department of Trade and Commerce on November 19, 1926, the amount due the school district was $4084.02. The actual cash in the bank at the time was $3519.35, but there were overdrafts charged against the bank of more than $5000.00. On April 25, 1928, the receiver took charge of the bank at which time there was due the school district the sum of $1767.26. At that time there was no actual cash in the bank, but the books showed there was a balance due the bank in the Omaha National Bank of $582.96. Mr. Crossland, auditor for the Department of Trade and Commerce, testified that was the amount "the receiver receipted for when he took over the bank." On June 3, 1927, the balance in the bank due the school district was $4400.26 and the account was not changed from then on.

The trial court apparently did not hold that the school district could not prosecute its claim for a trust fund and a first and paramount lien on the assets of the bank on account of the former classification and allowance of its claim. This question does not appear to be an issue before this court and is not contended for by the receiver in his brief. A similar question was presented in *State* v. *Bank of Commerce*, 54 Neb. 725, 727, where it is contended that the county by accepting 15% dividend was estopped from asserting that it was a preferred creditor. The court held that the county is not estopped from asserting that its claim is a preferred one because of the action of the county board and the treasurer in the premises. *State* v. *State Bank*, 119 Neb. 519, 229 N. W. 892. There is no showing that the receiver was prejudiced

by the school district's prosecuting its claim as a preferential one. *Wuerpel* v. *Commercial Germania Trust and Savings Bank*, 238 Fed. 269.

The school district contends that under the common law of England, the king was entitled to be paid out of the assets of his debtor subjects in preference to other creditors. The common law of the United States, prior to the admission of Nebraska to statehood, recognized the rights of the several states in their sovereign capacity to the preferential rights under the prerogative power as it existed in England in the king. The preferential rights of the sovereign states to be paid first out of the assets of the debtors under prerogative authority were adopted as a part of the law of the various states through the adoption of the common law by such states. The school district has cited in support of its contention numerous authorities from other jurisdictions. They are convincing. The trial court held, as shown by the briefs, that there is a complete plan for winding up the affairs of state banks in Nebraska as provided in Chapter 30, Section 24 of the Session Laws of 1925 (8-1, 102 Statutes of 1929). This section provides that the claims of depositors for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all claims except federal, state, county and municipal taxes; and that subject to taxes, shall, at the time of the closing of the bank, be a first lien on all the assets of the bank. The trial judge also makes reference to the note by the annotator in 65 L. R. A. 1333, where it is stated: "A statute covering the general field of dissolution and insolvency of state banks, which provides that all assets of such banks shall be ratably distributed among the creditors thereof, giving preference in payment to depositors, has been held to waive or extinguish any right which the state may have to a preference by virtue of its sovereignty. *Leach* v. *Exchange State Bank*, 200 Iowa 185, 203 N. W. 31." No authorities are cited from this state to sustain the contention that Nebraska possesses the crown's common law prerogative to have its debts paid in preference to the debts of other creditors. In *Freeholders of Middlesex Co.* v. *State Bank*, 29 N. J. Eq. 268, 271, in

answer to the contention that the crown's prerogative was a part of the common law of New Jersey, it is stated and held: "It certainly has never received judicial approval, and, so far as my knowledge extends, no law officer of the state has ever attempted to enforce it. For over one hundred years as an actual, practical prerogative of government, it has neither been exerted nor recognized, and this circumstance, as a matter of contemporaneous and long continued construction by all departments of the government, would seem to negative the existence of the right with a great emphasis." This doctrine has never been asserted, to our knowledge, in the sixty-odd years of judicial history in Nebraska. "A prerogative which has remained so long practically useless can hardly be said to exist." *Freeholders of Middlesex Co.* v. *State Bank, supra.*

In the closing paragraph of the school district's brief it is stated: "If this court should find that the school district is not entitled on the prerogative theory to the total amount due it, then the school district has identified $580 ($582.96) of the bank, and is entitled to a specific trust of that amount." In support of its contention the school district cites and relies on *State* v. *Midland State Bank,* 52 Neb. 1, where a similar state of facts existed. In that case, John Bondesson, as treasurer of the district, deposited in the bank $1308.08, money of the district, and subsequently made other deposits as such treasurer, amounting to $2241.83. He checked against the account from time to time and there was to his credit in the bank when it passed into the hands of the receiver, $1463.86. The bank was at all times advised of the fact that the money deposited belonged not to Bondesson but to the school district. It was held, per Post, C. J.: "1. It is not within the power of the treasurer of a school district by a general deposit of funds held by virtue of his office to create between such district and his banker the relation of debtor and creditor.

"2. A banker by receiving on deposit from a school district treasurer funds known to be held by the latter in his official capacity becomes thereby a trustee for the

beneficial owner with respect to such funds, and the same may, upon his insolvency, be recovered by the owner as a preferred claim against his estate."

In *City of Lincoln* v. *Morrison,* 64 Neb. 822, it is held, per POUND, C: "Where a trustee mingles trust moneys with his own funds, *cestui que trust* is entitled to a charge upon the whole; and so long as any portion of the mass into which the trust funds has entered remains in any form, it is subject to such charge, and may be followed and claimed." It is further held that "where such money has gone into the general estate of a trustee, who afterwards becomes insolvent, there is a presumption that it remains therein at his insolvency and the court will not say that it cannot be traced or has wholly disappeared where the contrary may fairly be inferred." *The City of Lincoln* v. *Morrison, supra,* is cited with approval in *Central National Bank* v. *First National Bank,* 115 Neb. 444 at page 450, 57 L. R. A. 885, per GOOD, J; and is also cited with approval in the same case by ROSE, J. at page 454.

While it is asserted by the receiver that the $582.96 was not cash in the bank, but only a credit in the Omaha National Bank, the receiver treated it as cash and receipted for it as such. In the absence of proof to the contrary, it must be presumed the Omaha National Bank was solvent and that it paid the amount due the bank to the receiver.

We conclude the trial court should have allowed the school district the $582.96 as a trust fund and given it a first lien thereon; and we therefore recommend that the decree of the trial court be reversed with directions to enter a decre in accordance with this opinion.

Reversed with directions.

Commissioners Thompson and Wolff concur.

Good and Eberly J. J. dissent.

SUPREME COURT OF NEBRASKA,
JANUARY TERM, A. D. 1931.
TUESDAY, JUNE 16, 1931.

Court met, pursuant to adjournment.

Present:

Charles A. Goss, Chief Justice,
William B. Rose, Judge,
James R. Dean, Judge.
Edward E. Good, Judge.
George A. Eberly, Judge,
L. B. Day, Judge,
Bayard H. Paine, Judge.

State of Nebraska, ex rel.)
O. S. Spillman, Attorney General,)
Appellee,)
v.)
S. S. Hadley Company, Bankers) Appeal from the District
of Cedar Rapids, Nebraska, and) Court of Boone County
R. O. Brownell, Receiver,) No. 27751
Appellees,)

School District No. 6 of Boone)
County, Intervener,)
Appellant.)

This cause coming on to be heard upon appeal from the district court of Boone County, was argued by counsel and submitted to the commission; and the commission having found error apparent in the record of the proceedings and judgment of said district court, and in its opinion having recommended that said judgment of the district court should be reversed and the cause remanded with directions to enter a decree allowing the school district the $582.96 in controversy as a trust fund, and that the school district be given a first lien thereon; and the court having examined said opinion, it is by the court considered, ordered and adjudged that said findings and recommendations of the commission be, and hereby are, approved and

said judgment of the district court is reversed and the cause is remanded with directions to enter a decree allowing the school district the $582.96 in controversy as a trust fund, and impressing a first lien for said amount thereon in accordance with the opinion this day filed herein; that appellant recover from appellees its costs herein expended, taxed at $; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Wilson, C.

Good and Eberly, JJ. dissent.

Supreme Court
} ss.
State of Nebraska

I, George H. Turner, Clerk of the Supreme Court of the State of Nebraska, do certify that I have compared the foregoing copy of Page 338 of Journal WW, containing judgment, in the case of State ex rel. Spillman vs. S. S. Hadley Company, No. 27751, with the original now on file in my office, and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 4th day of January, 1936.

GEO. H. TURNER,
Clerk.

[SEAL]

By.....
Deputy.

Comp. St. Nebr. 1929, Sec. 27-224: When the Supreme Court Commission shall have been organized, the clerk of the supreme court under the direction of the supreme court shall examine the civil docket, and from such docket shall list such cases as in the opinion of the supreme court should be assigned to the commission for hearing.

and the court shall by formal order assign such list of cases to be heard by the commission under such rules and regulations as shall be prescribed by the court. In cases so listed and assigned the parties shall be entitled to be heard on printed briefs, and oral arguments, and the unsuccessful party shall have his motion for rehearing before the commission. In all cases so assigned the commission shall make full findings of fact, and conclusions of law arising from such facts, and an order or judgment disposing of the case. These findings of fact, conclusions of law and orders or judgments shall then be certified to the supreme court, and when the same shall have been approved and adopted by the supreme court, they shall be spread upon the records of the court and shall be a final disposition of such cases; PROVIDED, HOWEVER, such proceedings shall not be published in the reports of the court or in any other reports and shall establish no precedent and be authority only in that particular case. The court shall from time to time make and assign similar lists of cases to the commission which shall be disposed of in the same manner. (1929, p. 335).

SUPREME COURT OF THE UNITED STATES.

No. 348.—October Term, 1935.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Petitioners,

vs.

L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, bankrupt.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 2, 1936.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The City of Lincoln, Nebraska, a municipal corporation, sought priority in the payment of its claim against the Lincoln Trust Company, bankrupt. The claim was for $45,000, with interest. The City based its contention on Section 64b of the Bankruptcy Act, and also claimed that the amounts in question had been placed in the custody of the Trust Company as a trust fund. The District Court held that the City was not within Section 64b, and that the trust had not been established except as to the sum of $628.63. The court directed that the remainder should be allowed as a general claim. The Circuit Court of Appeals modified the judgment by disallowing altogether the claim of priority, and, as modified, the judgment was affirmed. 77 F. (2d) 425. We granted certiorari, limited to the question of the application of Section 64b. 296 U. S. —.

Section 64b is as follows:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . . (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: Provided, That the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States".

The question is presented whether a municipal corporation is a "person" within the meaning of this section. The word "person" is expressly stated to include corporations. A municipal corpora-

tion is a corporation in the usual sense of the term. Does the Bankruptcy Act use the term in a more limited sense?

Section 1a (6) provides that

"'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business conducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument".

We find nothing in this definition which can be taken to exclude municipal corporations. The words "having any of the powers and privileges of private corporations not possessed by individuals or partnerships" do not mean, as the context plainly shows, that those described must be "private corporations", but that the term embraces those which have powers and privileges analogous to those of private corporations and not possessed by individuals or partnerships. Municipal corporations have such powers and privileges and thus fall within the definition of the term "corporations" as used in the Bankruptcy Act. The range of the definition shows the intention of the Congress to widen rather than to restrict the term.

Other provisions of the Bankruptcy Act, by expressly excluding municipal corporations in certain relations, indicate that they were intended to be included when, in the absence of exception, the reference is to "corporations" generally, or to "persons",—a term which, in the section containing the general definition, is stated to "include corporations, except where otherwise specified". Section 1a (19). Thus Section 4 provides:

"a Any person, except a municipal, railroad, insurance, banking corporation or a building and loan association shall be entitled to the benefits of this Act as a voluntary bankrupt.

"b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, (except a municipal, railroad, insurance or banking corporation or a building and loan association) owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act".

It is urged that in the provision of Section 64a specifying the priority of taxes owing by the bankrupt, a "municipality" is spe-

cifically named The United States and the States are also specifically named in that provision and again in Section 64b (7). But we think that the failure to repeat the word "municipality" in Section 64b (7) cannot be regarded as controlling in view of the express inclusion of "corporations" in that subdivision.

In construing the words of an act of Congress, we seek the legislative intent. We give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation. *Ozawa* v. *United States*, 260 U. S. 180, 194; *Ohio* v. *Helvering*, 292 U. S. 360, 370. Counsel at the bar could suggest no reason for allowing to corporations generally, or to the associations comprehended within the term "corporations" as used in the Bankruptcy Act, the priority given by Section 64b (7), when the state law provides for it, and denying that priority in accordance with state law to a municipal corporation. We can conceive of no reasonable basis for such a discrimination. And while we may assume that it would be within the power of the Congress to make it, we find no support in the provisions of the Act for the view that such a discrimination was intended.

Respondent strongly relies upon our decision in *Davis* v. *Pringle*, 268 U. S. 315. That decision was rendered in 1925, before the amendment of Section 64b (7) which defined the term "person" as there used. From an examination of the context, the Court reached the conclusion that the word "person" in the original provision was not intended to include the United States. The Court noted that "Elsewhere in cases of possible doubt when the Act means the United States it says the United States". *Id.*, p. 318. The Congress then amended Section 64b (7) by expressly providing that the term "person" should include the United States. Act of May 27, 1926, 44 Stat. 662, 667. But that amendment also provided that the term "person" should include "corporations". At the same time, by the amendment of Section 1a (6) the scope of the term "corporations" was extended so as to include "joint stock companies, unincorporated companies and associations". *Id.* In view of the explicit inclusion of "corporations" in the amendment of Section 64b (7), and the evident intention shown by the context not to restrict the meaning of the term "corporations",

the reasoning of the opinion in *Davis* v. *Pringle* cannot be regarded as apposite to the present case.

We conclude that a municipal corporation is a "corporation" and hence a "person" entitled to the priority accorded by Section 64b (7).

There is a further question, which is one of state law. The preference under Section 64b (7) is only in the case of "debts owing to any person who by the laws of the States or the United States is entitled to priority". The further question then is whether the City of Lincoln is entitled to priority under the law of Nebraska. The Circuit Court of Appeals did not determine that question. The court cited its decision as to the status of the City and County of Denver under the laws of Colorado (*City and County of Denver* v. *Stenger,* 295 Fed. 809; compare *U. S. Fidelity and Guaranty Co.* v. *McFerson,* 78 Colo. 338), and apparently assuming, without deciding, that the law of Nebraska accorded priority to the City of Lincoln, the court proceeded to base its decision in the instant case upon the inapplicability of Section 64b (7) to a municipal corporation. The law of Nebraska was not discussed.

As we hold that the construction placed upon the Bankruptcy Act was erroneous, the cause will be returned to the Circuit Court of Appeals for the determination of the remaining issue as to local law.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that court for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.